REPORT

PEOPLES' COMMISSION ON GATT

ON THE CONSTITUTIONAL IMPLICATIONS OF THE FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS

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1996

The National Working Group on Patent Laws and the Independent Initiative (New Delhi based organisations) constituted a non-official panel of judges entitled "Peoples' Commission on GATT" to examine the constitutional implications of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

The National Working Group on Patent Laws and the Independent Initiative entrust publication of the Peoples' Commission Report to the Centre for Study of Global Trade System & Development, New Delhi-India.

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The Peoples' Commission on GATT is pleased to submit its **Report on The Constitutional Implications of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations**

It would like to place on record its thanks to the large number of experts and organisations who willingly gave their time to make submissions to the Commission and apprise them of the various facets of this complex issue which required elucidation and assisted us.

Justice V R Krishna Iyer

Justice O Chinnappa Reddy

Justice D A Desai

Justice Rajinder Sachar

Members of the Commission

Justice V R Krishna Iyer
Judge, Supreme Court of India (Retd.)

Justice O Chinnappa Reddy
Judge, Supreme Court of India (Retd.)

Justice D A Desai
Judge, Supreme Court of India (Retd.)

Justice Rajinder Sachar
Chief Justice, Delhi High Court (Retd.)

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Chapter 1

Introduction

What once required wars has now been accomplished with words. The nation-state which emerged as the central political and economic construct in the post-World War II and post-colonial era of the mid-twentieth century, has become irrelevant as an integral unit. The locus of economic decision-making has been transferred from national governments to transnational corporations of the rich nations of North America, Europe and Far East Asia backed by the authority of a new World Trade Organisation (WTO). The international economic order has been radically restructured by a new treaty which encompasses virtually the entire economic spectrum—the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ("Final Act") issued by the Secretariat of the General Agreement on Tariffs and Trade on December 15, 1993. The Final Act was authenticated by 117 nations, including India, on April 15, 1994, at Marrakesh and has come into force upon its signature by member nations from January 1, 1995, despite massive and convulsive opposition within several member countries. A New World Trade Order of sorts has thus been made by a treaty suspected to be a treachery thro' displomatically engineered methodology aimed at opening international markets for giant cartels and corporations of 'developed' nations, based on a most ambitious trade liberalization package the world has ever seen. GATT is the global theatre, Dunkel, the official Operator and the U.S. the Super-Power pressurising member states into acceptance. Dunkel's retirement brought in Sutherland as the

successor but the protagonist was all the time America Inc. That Super-Power was, and is, facing a grave economic recession from which, cynics and critics allege, the Dunkel plan is a Dunkirk of trade retrieval. The Final Act is around 500 pages long and contains plural legal texts which spell out the results of negotiations for seven long years.

The coverage of the several agreements, collectively making up the Final Act, is vistaramic. The difficulty of understanding with clarity this portentous and prolific instrument is to compounded by the Dunkel genius for using vocabulary rife with acronyms and jargonised by formulae that this Final Act wears the inscrutable face of a sphinx. Many of the clauses of the voluminous Text, as updated and approved, often look like 'a riddle wrapped in a mystery inside an enigma'. Many hostile intellectuals, especially of Third World countries, hold the view that the Final Act has, vis-a-vis developing nations and former colonies, 'nothing to offer, but blood, toil, tears and sweat'. So it is that expressions like 'GATTAstrophe', 'recolonisation', 'design for disaster', 'conquest by patent', and 'Patent Folly' et al have gained currency. The tryst with destiny India made through Nehru when Freedom dawned, the Preambular Promise our Founding Fathers made during the constitutional incarnation of the Sovereign Democratic Republic, impregnated with social justice, anti-imperialism, public sector undertakings occupying the commanding heights of the national economy, Swadeshi and economic self-reliance as basic to swaraj in a world of exploitative multi-national corporate power—all these, it is argued, may suffer future shock and the ensuing irreversible colonising process may diminish our sovereignty and paralyze our progress unless people act. Even our media may become marionettes used by press barons with global grab power to condition our minds, reducing India to the status of a banana republic. Of course, this view is opposed by many economists, business magnates, persons in high office, and others of their ilk who behold in the latest Final Act a blessing of competitive excellence promotive of macro-economic prosperity, dismissing the Gandhi—Nehru—Ambedkar heritage and commitment to the illiterate, indigent, unemployed populace as obsolete, primitive and non-viable in the post-modern unipolar

universe. For them *U.S.* is *US.* One is reminded of the Union Carbide's boastful advertisement: "When they look at us they see a little of you overseas, we are you.

The Final Act is *sui generis* among treaties in that its concerns are not limited to interborder trade issues but the internal functioning of domestic economics and their accessibility to foreign corporations in terms of financing, productive infrastructure and as market outlets. It sets forth rules governing domestic agriculture, intellectual property rights (e.g. patents, trademarks and copyright), foreign investment, infrastructural services (viz. telecommunications, air transport, banking and finance, and insurance), professional services, health and safety standards, besides the entire gamut of trade in goods. These rules are designed to allow the maximum freedom for corporate decision making and minimize the interference of national governments into the economy. In short, the Final Act represents an unprecedented transfer of power over economic functioning from the heads of nation-states to the dominant actors in the international market place, namely, the transnational corporations.

Concern over the impact of the Final Act on India's sovereignty, democracy and the Constitution has been expressed since the commencement of the Uruguay Round of Multilateral Trade Negotiations in 1986 by 250 members of Parliament, Heads of State Governments such as the Chief Minister of West Bengal, Sh. Jyoti Basu and the Chief Minister of Tamil Nadu, Smt. Jayalalitha, heads of political parties including Chandra Shekhar and V.P. Singh, as well as eminent jurists, lawyers, academicians, citizens' groups, and farmers. Nevertheless, as Chapter 4 indicates, the Indian Government failed to keep Parliament, the States or the people informed of India's position at the Uruguay Round of Negotiations, the positions taken by other nations and the progress of the negotiations.

Worse, the Indian Government never formulated a comprehensive white paper analyzing the effects of the proposed treaty on particular sectors of the economy and on democratic institutions. The scattered and truncated bits of information provided by the Government on the impact of the Final Act was in derogation of its duty in a democracy to act in a transparent

manner and keep the people adequately informed. Despite the unprecedented changes to the economy and the legal system contemplated by the Final Act, the Government never examined the constitutionality of the treaty.

Concern over the constitutionality of the contemplated treaty was spearheaded by the National Working Group on Patent Laws and the Independent Initiative which approached eminent retired judges of the Supreme Court and a former Chief Justice of the Delhi High Court to examine the constitutionality of the Dunkel Draft. On November 9, 1993, the National Working Group on Patent Laws and the Independent Initiative constituted a non-official judges panel entitled, the Peoples Commission on GATT, to examine the constitutional implications of the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, in light of the social, economic and democratic framework of the Constitution, and prepare a report. The Commission was requested to take written and oral evidence from a cross section of scientists, economists, jurists, political scientists, social activists, Government representatives and political personages. On December 15, 1993, the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ("Final Act") which supplanted the Dunkel Draft was issued by the GATT Secretariat. Accordingly, the Commission's attention was duly directed to the Final Act.

MEMBERS OF THE COMMISSION

The members of the Commission are as follows:

Justice V.R. Krishna Iyer
Judge, Supreme Court of India (Retd.)

Justice O. Chinnappa Reddy
Judge, Supreme Court of India (Retd.)

Justice D.A. Desai
Judge, Supreme Court of India (Retd.)

Justice Rajinder Sachar
Chief Justice, Delhi High Court (Retd.)

WORK OF THE COMMISSION

The Commission conducted two series of hearings before submitting a Preliminary Report on December 12, 1993. These meetings were held on November 26, 1993 and December 10-11, 1993. Subsequently, hearings were held on April 20-22, 1994 and July 15-16, 1994. Eminent academicians, economists, scientists, journalists, lawyers, politicians and activists made oral and written submissions before the Commission which are summarized in Chapter 6. The list of persons who made submissions before the Commission is provided in *ANNEXURE-1*. The Commission was also provided further information in regard to India's ratification of the Final Act and issue of Ordinance on 31st December 1994 and the subsequent introduction of the Bill for replacing the Ordinance in Lok Sabha/Rajya Sabha on amendment of Patents Act, 1970.

FRAMEWORK OF THE REPORT

The Report of the Peoples' Commission begins with a detailed chronology of events in Chapter 2 which provides a basis for understanding the domestic and international context in which the Final Act was negotiated. A background regarding the functioning of GATT, 1948 and the numerous rounds of negotiations preceding the Uruguay Round is provided in Chapter 3. Chapter 4 details the Indian Government's handling of the Uruguay Round in terms of information and consultation with Parliament, the States and the People and the implications for the functioning of democratic institutions. Chapter 5 examines the critical sections of the Final Act and their implications on the political economy. Chapter 6 summarizes the written submissions before the Commission. Chapter 7 sets forth the views of the Commission on the constitutionality of the Final Act and Chapter 8 sums up the conclusions of the Commission.

Chapter 2

Chronology of Events

The chronology of events presented below begins with the commencement of the Uruguay Round of Multilateral Trade Negotiations in 1986 and culminates with the establishment of World Trade Organisation on January 1, 1995. The chronology indicates the initial unity of opposition by developing countries, led by India and Brazil, against the negotiating mandate of the Uruguay Round negotiations till the mid-term Ministerial Meeting at Montreal in December 1988 and their subsequent capitulation in April 1989. It further highlights the pressure exerted by the United States against India to make changes in its laws, particularly with respect to intellectual property rights and the service sector. The events summarized below also illustrate the Indian Government's failure to issue any comprehensive position papers regarding the demands made by other countries at the Uruguay Round, communicate the substance of the negotiations to Parliament or the Indian people or prepare any impact analysis of the obligations under negotiation on the domestic economy. It was only after extensive pressures were brought to bear by activist groups that the Indian Government gave some information on the progress of the negotiations. Mention must however be made about the highly inadequate nature of information that the people and the Parliament were provided.

CHRONOLOGY

20.9.1986
The Uruguay Round of Multilateral Trade Negotiations of the General Agreement on Tariffs and Trade (GATT) commenced at Punta del Este in Uruguay. The major trading powers attempted to enlarge the scope of GATT to cover services, intellectual property and investment in addition to goods. The Group of 77 Developing Countries, led by India and Brazil resisted this effort. A compromise was reached whereby negotiations relating to services were to be conducted outside the jurisdictional framework of GATT negotiations, and guided by the objective of development of the developing countries and not just be concerned with liberalization and dismantling existing regulatory structures. National regulatory frameworks were to be respected.

1.1987
Formal negotiations in the Uruguay Round commenced.

7.1987
U.S. tabled a plan to eliminate all farm subsidies within 10 years.

6.1988
Submission of a joint paper to GATT by MNCs Associations of USA, Europe and Japan on IPRs.

23.8.1988
U.S. President Ronald Reagan signed the Omnibus Trade & Competitiveness Act of 1988 which strengthened the ability of the United States Trade Representative (USTR) to retaliate against countries for "unfair trade practices" including alleged inadequate protection of intellectual property rights.

28.8.1988
Establishment of National Working Group on Patent Laws in India representing eminent citizens to analyse the implications of the GATT Negotiations.

12.1988
Mid-term Ministerial Review of the GATT negotiations in Montreal. Developing countries were pressured to accept the industrialized countries' demands on bring the substantive issues of IPRs within the scope of GATT. No agreement was reached on the issue of

IPRs as well as Agriculture and these issues were remitted back to the Trade Negotiating Committee in Geneva.

4.1989

Official level Meeting of GATT in Geneva. India capitulated, without any reference to Parliament or public discussion, and agreed to include substantive issues of intellectual property protection within the ambit of GATT negotiations.

25.5.1989

The United States Trade Representative (USTR) named the leaders of the Group of 77, India and Brazil as "priority countries" under the "Super 301" provisions of the Omnibus Trade and Competitiveness Act of 1988 based on India's foreign investment regulations and state control of the insurance sector.

30.5.1989

The USTR placed India on a "priority watch list" under the "Special 301" provisions of the 1988 Trade Act for failure to provide adequate protection of intellectual property rights.

20.6.1989

The USTR began an investigation of India's foreign investment practices and insurance industry under the "Super 301" statute.

28.7.1989

Indian Government issued a Press Statement on its views on Intellectual Property Rights—Standards and Principles.

5.9.1989

India submitted communications to the GATT Secretariat on:

(i) Applicability of the basic principles of GATT and of relevant international intellectual property agreements or conventions.

(ii) Enforcement of trade-related intellectual property rights.

(iii Multilateral framework for international trade in counterfeit goods.

1.11.1989

The USTR moved Korea, Saudi Arabia and Taiwan from the "priority watch list" to the regular "watch list" under Special 301. India, Brazil, Mexico, China and Thailand remained on the "priority watch list."

6.1990
USTR dropped complaints against India under "Super 301" statute.

30.11.1990
Indian Government issued a Press Statement on Indian Delegation's visit to Brussels Ministerial Conference.

12.1990
Ministerial Meeting of trade ministers at Brussels failed to conclude the Uruguay Round due to U.S.—EC dispute over agriculture.

26.4.1991
The USTR named India, China and Thailand as "priority countries" which have the most onerous policies that deny adequate and effective protection of intellectual property rights under "Special 301."

26.5.1991
The USTR began an investigation into the intellectual property practices of India, China and Thailand.

9.1991
Over 250 Members of Parliament and other prominent citizens issued a "Statement" on Uruguay Round Negotiations and Special 301.

20.12.1991
The Director-General of GATT, Arthur Dunkel, issued the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ("Dunkel Draft").

1.1992
Appeal of eminent personalities from all over the country for preservation of economic sovereignty.

1.1992
The Union Government appointed a Committee of Ministers to examine the GATT issues. No formal report was submitted by the Committee although it met a number of experts and representatives of various industry and commerce chambers and NGOs.

1.1992
Political parties issued separate statements regarding their stand on the GATT negotiations.

28.2.1992
The USTR determined that Indian intellectual property practices burdened and unduly restricted U.S. commerce within the meaning of the "Special 301" statute.

29.4.1992
The USTR retaliated against India by suspending duty free treatment of US $ 60 million worth of pharmaceutical imports from India under the Generalized System of Preferences (GSP) under GATT.

7.1992
The Ministry of Commerce privately circulated a paper titled, "The Uruguay Round of Multilateral Trade Negotiations—A Paper for Discussion."

The paper stated that changes to the Patents Act are contemplated and are in the offing; such a statement directly contradicted the Union Government's assurances given to Parliament on 4th August, 1987, 15th November, 1988, 19th and 27th March, 1990, 4th and 11th May, 1990 and 11th September, 1991, that there would be no changes in the Patents Law.

21.10.1992
Shri Jyoti Basu, Chief Minister of West Bengal, wrote to the Prime Minister demanding that the States be consulted before a decision is taken on the Dunkel Draft.

11.1992
U.S. and EC reach the "Blair House" accord on agriculture.

12.1992
40 eminent personalities and Members of Parliament issued an "Appeal" to the Government to adopt a democratic approach to the Dunkel Draft by referring it to a Joint Parliamentary Committee.

23.12.1992
Members of Parliament in the Lok Sabha protested the lack of discussion and information and the government's cavalier attitude.

27.1.1993
Party leaders issue joint letter to the Prime Minister to appoint a Joint Parliamentary Committee to examine the Dunkel Draft.

7.1993
Peter Sutherland replaces Arthur Dunkel as the Director-General of GATT.

28.8.1993
Members of Parliament protested the lack of discussion and information regarding the Dunkel Draft.

9.1993
The Ministry of Commerce issued a public document to the members of Parliament entitled, "The Uruguay Round of Multilateral Trade Negotiations: A Background Paper for Discussion."

12.1993
The Department-Related Parliamentary Standing Committee on Commerce (Gujral Committee) submitted its report on the Dunkel Draft.

12.1993
Opposition parties in Parliament failed to secure a substantive discussion on implications of the Dunkel Draft.

14.12.1993
U.S. and EC reach an agreement on agriculture which permitted the Uruguay Round to draw to a close.

15.12.1993
GATT Secretariat issues the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" which countries agree to submit to their governments for approval. Uruguay Round closes.

30.12.1993
The Chief Minister of Orissa, Sh. Biju Patnaik, wrote to the Prime Minister demanding that the States be consulted before the Final Act is ratified.

4.1.1994
The Chief Minister of Tamil Nadu, Smt. Jayalalitha, wrote to the Prime Minister demanding that a Conference of Chief Ministers be convened to examine the implications of the new treaty.

4.3.1994
The Chief Minister of Tamil Nadu repeated the request to the Prime Minister to convene a Conference of Chief Ministers.

18.3.1994
The Chief Minister of Orissa repeated his request to the Prime Minister for consultation with the States.

15.4.1994
The Government of India authenticated the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations with its signature.

31.12.1994
Promulgation of Ordinance by Government of India amending the Patents Act, 1970 and acceding to the WTO.

1.1.1995
Establishment of WTO.

3.1995
Introduction of Patents (Amendment) Bill, 1995 in Lok Sabha and its passing by Lok Sabha with a slender majority. The Bill could not be introduced in Rajya Sabha due to strong opposition by Opposition and Independent Members of Parliament in Rajya Sabha.

Besides the above events the National Working Group on Patent Laws organised in India national seminars/conferences on 22.11.88, 04.12.89, 28.10.90, 30.12.90, 16.04.91, 27/28.7.91, 26.11.91, 20/21.12.91, 12.01.92, 15.02.92, 27/28.04.92, 02.05.92 and 26.05.92, and issued statements and resolutions which were forwarded to the concerned Ministries of the Central Government, Members of Parliament, eminent personalities and activists in the country to apprise them of the implications of the GATT issues.

The National Working Group on Patent Laws also organised signature campaigns in September 1991, December 1991 and January 1992. The statements/appeals were signed by Members of Parliament, eminent citizens and leaders of different political parties requesting the Government of India to have in depth discussion in Parliament, set up Joint Parliamentary Committee and consult the State Governments on GATT issues.

The National Working Group also organised three international conferences on March 15-16, 1990, February 18-20, 1993 and September 2-4, 1993. The recommendations were formally submitted to the Government. Government did not respond to these resolutions, appeals and recommendations.

The National Working Group on Patent Laws also widely circulated its Resolutions/Statements and publications in India and abroad through the diplomatic Missions in India and directly.

Chapter 3

Background of GATT 1948, The Uruguay Round and U.S. Pressures Against India

GATT—A BRIEF HISTORY

The Bretton Woods Conference (1944) marked the beginning of a new World Trade Order, switched the purpose of global alliances from the openly military to the plainly economic, and this paradigm shift is basic to an understanding of the nature and structure of the Final Act cannily crafted by Arthur Dunkel. Bretton Woods created the World Bank and the International Monetary Fund (I M F). The thrust of the New Economic Order which the U.S. and its allies desiderated was conquest by trade using the blessings of '*liberalisation*', privatisation and globalisation as the magic catchwords. Long years ago, Calvin Coolidge had said that "the business of America is business". Ralph Nadar later drew the inference in his Prologue to the book *America Inc.* that Big Business is government. Woodrow Wilson put it more bluntly:

> The masters of the government of the United States are the combined capitalists and manufacturers of the United States. It is written over every intimate page of the record of Congress, it is written all through the history of conferences at the White House, that the suggestions of economic policy have come from one source, not from many sources . . . . The government of the United States at present is a foster child of the special interests."

It is poignantly interesting to read a recent book titled 'On Third World Legs' by S. Brian Willson. There he says after a visit to latin American countries and reflecting over the 'New World Order':

"During our three-month visit to Latin America we were able to witness the new world order in action and by looking in the eyes of the people and hearing their testimony learn first hand about its devastating effects. What did we discover?

That the gross violations of national sovereignty through our direct interventions in Panama and Nicaragua and our participation in the coups in Brazil and Chile—which were followed by terror and repression—cost the lives of thousands of people and affected the lives of millions more.

That the Andean initiative—the extension of the war on drugs to Latin America—is merely a pretense for our participation in the counter-insurgency campaigns being carried out by the Peruvian and Colombian governments against the popular movement. They are killing its leaders and bringing terror to their communities.

That the neoliberal or "free" market economic policies are the deus ex machina of the new world order and a new form of low-intensity warfare. Neoliberalism offers a model for economic development which is econologically disastrous and unsustainable. It is a source of structural violence—poverty, hunger, ignorance, disease. It then uses political violence and terror to express the discontent and dissent which are its inevitable by-products.

We found islands of prosperity in every major city we visited. A small minority of the people were clearly reaping the benefits of a "free" market economy. But we also found that the "free" market had consigned millions of others to the margins of the society—to favelas or squatter towns, to lives of misery, fear and desperation. We heard about the riots in Los Angeles while we were in Santiago, Chile. We understood immediately that they were a result of the operation of the same neoliberal economic policies whose effects we were witnessing in Latin America." [Page 89 of the book

Beware India must be aware that:

> "After World War II, a sense of global Manifest Destiny came to dominate United States policies. Between 1945 and the late 1980s, the United States militarily intervened more than 200 times into the internal, sovereign affairs of well over 100 "third world" countries, causing directly or indirectly the murders of 20-25 million human beings and the maimings of at least that many". [IBID. Page 50]

The sense of hegemony is die-hard part of pax Americana.

Be that as it may, pursuant to the world trade objective of Bretton Woods, another institution to operate and oversee the 'liberalisation' of World Trade was brought into being in 1948, i.e. the GATT (General Agreement on Tariffs and Trade. Under its basic framework, all contracting parties, big and small, are bound by the most favoured nation (MFN) clause; unequals being treated equally! Moreover, protection for domestic industry should be provided only through tariffs. Measures like import quotas or licensing Measures like import quotas or licensing are prohibited. GATT is a trading agreement between signatory countries. It was a temporary arrangement to be replaced by the Havana Charter and the International Trade Organization (ITO). However, the ITO was not ratified by the Congress of the United States of America; as a result, the GATT became a provisional treaty that continued to govern international trade for the next 45 years.

The GATT 1948 was essentially a code of rules and a forum to negotiate and resolve trade disputes arising out of the international sale of goods. Its main concerns were to ensure that all nations are accorded equally favourable treatment ("most favoured nation": Article I), to limit protectionism to tariffs and to reduce them (Articles XI-XIV) and to ensure that there is no discrimination in favour of one's own domestic products and against the products of other countries imported into ones territory, through discriminatory internal taxation and regulation (Article III: National Treatment). The GATT 1948 provided a dispute resolution mechanism beginning with mutual consultation (Article XXII), formal representation on perceived nullification and impairment of one's right and consequent mutual adjustment (Article XXIII.1) and finally if these two avenues fail to yield satisfactory results,

through panel investigation and findings on the complaint of impairment or nullification of rights leading to, in serious circumstances, authorisation by the supreme collective organ of GATT of the injured party to suspend the application of its obligations under the Agreement towards the offending party (Article XXIII.2)

A very important feature of the GATT Treaty has been virtual unamendability of Article I. This Article which conferred the right to all members of non-discriminatory treatment for its goods at the border of all other members cannot be amended except with unanimous approval of all members.

During the first 30 years of the GATT's existence, seven major trade negotiations took place: The Geneva Round (1947); Annecy, France (1949); Torquay, England (1951); Geneva (1956); Dillon Round (1960-61); Kennedy Round (1964-7) and Tokyo Round (1973-79). Finally the Uruguay Round, the eighth round of negotiations commenced in September, 1986. Each of these negotiating rounds coincided with amendments to United States trade laws[1]—a fact which has often been cited as evidence of the symbiotic relationship between the U.S. and GATT and America's use of GATT as a vehicle for its own trade objectives.

In the Geneva Round (1947), 20 schedules were established which covered tariff concessions. In the Torquay Round (1951), tariffs were reduced by 25% in relation to the 1948 levels. Tariff concessions on a product-wise basis continued to be made in each successive round. In the Kennedy Round (1964-67), tariffs were cut by 50% in many areas and a code on anti-dumping was formulated. In the Tokyo Round (1973-79), the average weighted tariffs on manufactured goods in the nine major industrial markets were reduced from 7.0% to 4.7%. The Tokyo Round also

1. The first five rounds of GATT negotiations were accompanied by amendments to the Reciprocal Trade Agreements Act of 1934. The sixth, the Kennedy Round (1962-67), was launched almost simultaneously as the Trade Expansion Act was enacted in 1962. The Tokyo Round that began in 1973 was followed by the Trade Act of 1974 and the Uruguay Round launched in 1986 was accompanied by the enactment of the Omnibus Trade & Competitiveness Act of 1988.

established codes on subsidies and countervailing duties, technical barriers to trade, import licensing procedures, government procurement, customs valuation and separate agreements on dairy products, bovine meat and civil aircraft. As a result of these GATT Rounds, tariffs on manufactured goods were reduced to an average of 5% in the rich industrialized countries as compared to the 40% levels prevailing in the 1940s.

A review of the functioning of GATT in 1958 by the Haberler Committee (named after the Chairman of the Group of Experts Gottfried Haberler) revealed that the developing countries' failure to obtain adequate gains from trade was due to the trade policies of the developed countries. An expert committee, instituted as a follow-up to the Haberler Report, also found that, despite the dispensations of GATT, developed countries were hindering exports of both traditional goods and manufactured products by the developing countries through imposition of tariffs, quantitative restrictions, internal taxes and other measures. For example, the developed countries had restricted exports of cotton textiles by developing countries despite the GATT prohibition on quantitative restrictions. It had become apparent that most critical decisions were taken among a small group of the richest nations and the GATT represented only their interests.

In an effort to remedy the inequitable functioning of GATT, the developing countries raised their objections at the United Nations. In response, the United Nations Conference on Trade and Development (UNCTAD) was established in 1964 to address the relationship between trade and development. Under pressure from UNCTAD, the industrialized countries agreed that the developing countries did not have to fully reciprocate all commitments to remove tariff and non-tariff barriers undertaken by the richer countries. The new part IV of GATT embodied in Article XXXVI instituted the Generalized System of Preferences (GSP) under which developing countries have benefitted by measures such as elimination of import duties. However, the special dispensations under Article XXXVI were non-mandatory and peripheral to the essential functioning of GATT which remained essentially in rich man's club.

Global trade statistics confirmed the view that GATT enabled

the developed countries to dominate trade flows. In 1966, the developing countries accounted for only 11.2% of manufactured exports. Two decades later, in 1986, their share had increased to only 13.8%.

Significantly, the most recent round of GATT negotiations, the Uruguay Round, commenced in 1986—the same year in which the United States transformed from a net creditor to a net debtor nation and Japan had taken its place as the world's largest creditor. By the mid-1980s, Japan had also surpassed the U.S. in technological prowess; in 1987, America's National Academy of Engineering reported that Japan is superior to the U.S. in 34 critical areas of high technology. Japan had replaced the U.S. as the key player in world economic markets as Japanese corporations accounted for 48% of world capitalization and 15 of the 20 largest corporations in the world. Meanwhile, the U.S. faced recessionary conditions at home because of the declining international competitiveness of its industries.

In response, the U.S. government identified two areas in which it could still dominate export markets especially if foreign countries were forced to open their markets: agriculture and services. The U.S. also hoped to maximize its monopolistic gains in the area of technology by raising the level of intellectual property protection globally. The best way to enforce such global regime, the U.S. thought, was by linking the substantive issues of intellectual property protections to trade negotiations and using retaliatory trade sanctions to compel others to agree to their proposals in this area. After half a century of heavy government subsidization allowed under the waiver obtained by the U.S. from the GATT provisions on agriculture, U.S. agri-business corporations led the world in terms of production capacity and technological strength. U.S. service industries especially banking, insurance, informatics, telecommunications and air transport have also been highly successful internationally. The U.S. has also led the world in patenting genetically engineered plants and animals.

A blow by blow account of the developments expanding the gluttonous scope of the Uruguay Round is not necessary here. After the Tokyo Round (the seventh), the eighth i.e. the Uruguay Round began in 1986 and new items, of gargantuan potential,

were put on the agenda, despite resistance by developing countries like India and Brazil. Mr. Arthur Dunkel, Director General of GATT and Chairman of the Trade Negotiating Committee (T.N.C.) pursued his plan adroitly and finally the developing countries caved in. By way of aside, one may mention that the case of China is different. China is not a Contracting Party of the GATT and the social, political, and military situation is so different that a comparison between India and China leads to a gross distortion of understanding. The political and constitutional position of China gives it a strength in resisting menacing American postures which cannot apply to India. This is evident from the failure of the American threats to China on the ground, among other of near-surrender when the U.S. intimidates, ministerial verbal bravado notwithstanding.

Until the Uruguay Round, the GATT only applied to goods. It excluded services, investments and intellectual property from its purview and contained broad exclusions with respect to agriculture. When the Uruguay Round commenced with the ministerial meeting on September 20, 1986 in Punta-del-Este, Uruguay, the U.S. attempted to enlarge the scope of GATT to cover four new areas in which it perceived a comparative advantage: services, intellectual property, investment, and agriculture. The Uruguay Round was launched with the "Punta del Este Declaration" (see *ANNEXURE-2*). The enumerated subjects for negotiation under the Punta del Este Declaration were not confined to the usual matters such as tariffs, non-tariff measures, textiles and clothing, but also included, for the first time, intellectual property rights (e.g. patents, copyrights, trademarks) under the rubric of "trade-related aspects of intellectual property rights, including trade in counterfeit goods." The subjects for negotiation also included regulations pertaining to foreign investment under the rubric of "trade-related investment measures." Thus, the ground was laid for expanding the scope of the GATT negotiations beyond inter-border regulation of trade in goods to the internal functioning of domestic economies.

The U.S. effort to enlarge the scope of GATT negotiations was vigorously resisted by 10 developing countries—led by India and Brazil along with Egypt, Yugoslavia, Nigeria, Tanzania, Peru, Cuba

and Nicaragua. A compromise was reached whereby negotiations relating to services were to be conducted outside GATT framework, be guided by the objective of development of the developing countries and should not just be concerned with liberalization and dismantling existing regulatory structures. Indeed the national regulations were to be respected. It was further agreed that discussions on intellectual property should follow the approach already contained in Art. XX(d) of the GATT Treaty which ensured that every member country had the freedom to pursue its own regime of protection of intellectual property and which merely required that no member country may use this freedom arbitrarily and in a discriminatory manner against the products or goods imported from another country into its territory. India's stance was universally recognized as proper and courageous. It virtually blocked the developed countries' move to extend GATT to new areas for further enhancement of their benefit and to the detriment of the development of developing countries.

Formal negotiations in the fifteen areas identified in the negotiating mandate commenced in January 1987. In July 1987, the U.S. tabled a plan to eliminate all farm subsidies within ten years which caused an uproar in the European Community (EC). In July 1988, the coalition of European, Japanese and American business associations brought forth a proposal for all round enhancement of intellectual protection levels and for enforcing the same through GATT mechanism that provided for trade retaliation. Industrialized countries led by U.S. were already pursuing this line and were engaged in widening the ambit of the negotiations to include the new and unrelated issues of IPRs and investment. A small group of developing countries led by India and Brazil was resisting these manouevres in order to keep the scope of negotiations within the narrow confines of the Punta-del-Estate Declaration.

In order to attempt a break through, a ministerial meeting of the Trade Negotiating Committee was held in Montreal in December 1988. This was the so-called mid-term Ministerial Review meeting. Despite heavy pressures, neither India nor Brazil agreed to bring IPRs within the ambit of negotiations at the mid-term review meeting. The EEC could not agree to the American radical

proposals on the liberalization of trade in Agriculture. The result was a stalemate and the mid-term review ended only in disagreement in crucial areas. These areas were then remitted to the negotiating machinery at Geneva.

Since the ministerial review, pressures were brought to bear by the U.S. against India to agree to its demands to enlarge the scope of GATT under the Omnibus Trade & Competitiveness Act of 1988. The 1988 Trade Act created two new provisions viz. "Super and Special 301", the former mandated the United States Trade Representative (USTR) to retaliate against foreign practices which are "unjustifiable and burden or restrict U.S. commerce" and the latter required the USTR to investigate and retaliate against countries which allegedly deny "adequate and effective protection of intellectual property rights".

At the official meeting at Geneva in April 1989, the U.S. backed down on its demand for reduction in farm subsidies and agreed to "substantial progressive reductions" in trade-distorting farm supports, thus facilitating a breakthrough in the progress of negotiations. IPRs thus remained the only major area of disagreement. Pressures were mounted on India to give up or dilute its stand, and India succumbed to U.S. pressures agreeing to bring the new areas of substantive issues of intellectual property rights within the scope of GATT negotiations. However, as discussed in detail below, India's capitulation was made without any consultation with Parliament or the States or any public explanation. As a result, the very structure of the GATT negotiations was formulated on the basis of advancing America's specific economic priorities and India's adherence thereto was without either the knowledge or consent of Parliament, the States or the people.

Even after India's capitulation in April 1989, the U.S. continued to resort to unilateral strong-arm tactics against India. This was presumably to ensure that the Geneva agreement of April 1989 is adhered to by countries like India and Brazil throughout the remainder of the negotiations. On May 25, 1989, the USTR named India and Brazil as "priority countries" under the "Super 301" statute citing India's foreign investment regulations (i.e. approval requirements, limits on foreign equity participation, import substitution policy and export promotion requirements) and

nationalization of the insurance sector. Within a month, the USTR began an investigation under which pressure was brought to bear against India until December 1990.

On May 30, 1989, the USTR additionally placed India on a "priority watch list" under the "Special 301" provisions of the 1988 Trade Act for its alleged failure to provide adequate patent protection for all classes of inventions, discrimination against foreign trademarks, failure to adequately register service marks, failure to enforce its copyright laws against piracy and improved access and distribution of U.S. motion pictures in India. Along with India, the USTR placed another 7 countries (Brazil, Mexico, People's Republic of China, Republic of Korea, Saudi Arabia, Taiwan and Thailand) on the "priority watch list" and the remaining 17 countries (Argentina, Canada, Chile, Columbia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, the Philippines, Portugal, Spain, Turkey, Venezuela and Yugoslavia) under a "watch list" .

Faced with this, the Union Government made brave statements in Parliament but did nothing to bring this pressure to a halt as being unconscionable. On November 1, 1989, the USTR moved Korea, Saudi Arabia and Taiwan from the "Special 301" "priority watch list" to the regular "watch list" because, unlike India and the other four countries, these three countries had in view of the USTR made "significant commitments to changing their intellectual property policies." To increase the pressure on India, on April 26, 1991, China, India and Thailand were named as "priority countries" under "Special 301". This meant that following investigation and negotiation, retaliation could be taken against India if India failed to comply with the USTR's demands.

Despite the naming of India as a "priority" country on April 26, 1991, the Indian Government had still refused to negotiate with the U.S. under the threat of retaliation. However, several of the U.S. demands were met by the economic reforms announced by the Narasimha Rao government in July, 1991. The new government removed restrictions on foreign trademarks and subsequently agreed to allow direct distribution and remove quotas and restrictions on imports of foreign films. Nevertheless, the USTR retaliated against India by suspending duty free treatment of US $60 million worth of pharmaceutical imports from India

under the Generalized System of Preferences (GSP) under GATT. By June 1992, US $ 80 million worth of pharmaceutical imports from India were adversely affected by the suspension of GSP. The "Super 301" and "Special 301" investigations that India was subjected to an assault on the country's sovereign right to determine its own laws and policies and constituted unconscionable pressure to capitulate even further in the GATT negotiations.

In January 1990, the U.S. blocked the majority preference for a "formula approach" to tariff-cutting which meant across-the-board reductions that would have forced large cuts in U.S. textile duties. Instead, negotiators were obliged to bargain item by item, country by country. In July 1990, leaders of the Group of Seven largest industrialized nations pledged to complete the Uruguay Round by the end of the year. However, the December 1990 ministerial meeting of trade ministers in Brussels failed to complete Uruguay Round due to the dispute over agriculture.

On 20th December, 1991 Arthur Dunkel tabled a Draft Final Act of the Uruguay Round. There were disputes between U.S. and E.C. on agriculture which prolonged matters and the *U.S. Congress* fixed 15th December, 1993 as the dead line through fast track approach for the world to accede. Peter Sutherland re-launched the negotiations with vigor.

On 15th December 1993, the final sessions concluded in Geneva and the Director General Sutherland brought his gavel down on seven years of Uruguay Round negotiations. On 15th April 1994 the ministerial meeting at Marrakesh, Morocco, ratified the result of the Uruguay Round. India too obeyed, and came home to play up GATT as the best bet. GATT, in its aggressive form, is projected by its proponents as a great blessing by hiding the facts that the Economic North had all along been robbing the Economic South and that the Uruguay Round would tighten the noose and secure quasi-colonialism. Julius Nyerere, wrote in 1990 about this phenomenon :

> "The new strategy is based on the use of economic strength against weakness and dependency; on technological domination face to face with technological backwardness; and on inherited cultural domination combined with control of international information structures.

There are many people in the world—in the field of politics as well as those less active in public affairs—who sincerely believe that the post - 1945 period has marked the triumph of genuine internationalism, and of interdependence of equally sovereign nations. They point to the United Nations and its Agencies, the World Bank, the multitude of world functional associations, institutions, and meetings, and to the trade and communications links between all parts of the globe. They believe also that the world's rich are helping the world's poor to overcome their poverty and underdevelopment through Aid and loans and technical assistance. Such people—as well as those to whom the use of strength against weakness is a natural and indeed progressive human trait—would condemn all talk of neo-colonialism or economic colonialism"

"What these innocent people do not realise is that through the workings of the present international economic arrangements, wealth flows almost all the time from the poor 'developing countries of the Third World to the industrialised and rich countries of the developed world. It flows from the primary producers to the industrialised countries, from the ignorant to the knowledgeable. How could they know these things? Virtually nothing in the Northern media gives them such information.

Yet that is the reality. The facts can be extracted from the statistics of all the international organisations; sometimes they are even mentioned in their Annual or Specialised Reports.

Tens of billions of dollars flow every year from the Economic South to the Economic North through movements in the terms of trade which have been adverse to the underdeveloped countries almost continually since the 1950's. The prices of primary commodities like cotton, coffee, cocoa, copper etc.—which are the major export products of the Third World—go down in relation to the prices of machinery, lorries, capital investments of all kinds, and most manufactured goods. To an ever increasing extent, Third World countries sell cheap and buy dear."

[In the Foreword to the Book "Recolonisation"
By C. RAGHAVAN—Page 20 to 22]

Wealth has all along been flowing from South to North through financial mechanisms and other strategies and when the victim nations became conscious of these iniquitous effects, they tried to come together demanding a new and more just international

economic order. The Brandt report in 1980 supported this thesis, but the North at the Cancun Conference (1981) resisted this structural change and reversed through the Uruguay Round which, would re-fashion the international trading system more favourably to the Economic North and produce a more unjust world economic order. This apprehension drove the poor nations to come together in 1964 to establish the Group of 77, which became the negotiating instrument of the South at the United Nations Conference on Trade and Development (UNCTAD). The agenda for a new international economic order with global justice and equitable development was put forward. In the words of the South Commission, the countries of the South were almost entirely buyers in the international market for technology, in which the sellers enjoy an oligopolistic position. Developing countries lacked, in various degrees, the information and the negotiating capability to secure fair and equitable terms when importing technology.

Market hunger manifests itself in various ways, sometimes by covert terrorist skullduggery. One pernicious process is the creation of blind admiration for the American glamorous life at the expense of the world's happiness as Rio demonstrated and remonstrated. The cost of the American way of life is best stated in Willson's book 'On Third World Legs':

> "This country consumes more than 40% of the world's production of natural resources with about 6% of the population, a disparity that is both practically and morally indefensible. The result of massive production is massive filth far beyond the absorbing capacities of our environment. Water in the U.S. is being polluted on an unprecedented scale. Modern technology such as that present in western New York is already pressuring nature with thousands of synthetic substances, hundreds of new ones being added each year, many of which resist decay—thus poisoning people, animals, plants, and minute but necessary organisms." [Page 26]

Market greed robs resources from the people who need and, this the accusers point out is at the back of GATT, 1944.

For this reason we may deviate a little to indicate how the West used other stratagems to capture a monopolist hold on

Third World economies. One major mechanism was forging for the whole GATT universe an American version of the Intellectual Property System through patents, Copyrights, Trade Marks and Industrial designs. For this, the Paris Convention (1983) was pressed into use. The game plan was to make India and like countries become members of the Paris Union.

> "The (Paris) Convention, amended several times, most recently in 1967, represents the effort of the western nations for "an imperial splitting up of the world markets to feed the expanding demands of an acquisitive capitalism". As of 1990-91, all the industrialised countries of the West and 58 developing (in all 97) countries including China were members of the Convention."
>
> [The Dunkel Draft, Design for Disaster—Introduction by B.K. Chandrasekhar—Page 9]

A few words on the Paris Convention, of which India is not a signatory yet, may be relevant here:

The Government was advised by the Justice N. Rajagopala Ayyangar Committee, in 1957, against the India's accession to the convention on the grounds that she would lose her freedom to exclude certain areas of development from patentability by foreign (and domestic) companies and to revoke patents when they are not worked in this country.

The main features of the Paris Convention, which, in large part, is incorporated into the Final Act are:

1. It guarantees to foreigners the same protection as the nationals of a given country (Articles 2 and 3). In reality, it means that the rich and powerful foreign companies, especially the multinationals, cannot be kept out of the clamour for patents on important products and for markets of the developing countries.

2. Article 5 legitimizes the notion that import of Articles involving patents shall not entail forfeiture of the patent on the ground of non-use. In other words, patents granted by our Government need not be worked in this country thus permitting and encouraging import of finished products. Import into the country is thus equated with the use of the patent in the country.

3. The procedure of 'Compulsory Licensing' is hedged in by

qualifying conditions such as that the patentee could justify failure to work the patent for legitimate reasons (Article 5 (iv)).

4. The stake could be claimed to the markets of the member nations by merely filing the patent application in any one country first and in all the rest of the countries within 12 months (Article 4 thus conferred the 'right to priority').

5. The duration of the patent is 20 years. Thus no manufacturer in India can introduce the patented product in the market for 20 years.

6. Essential items like food, medicine, substánces made with chemical processes are not "exempted", meaning, that they are subject to patenting." [IBID Pages 9, 10 & 11]

In India, entry into the Paris Convention was opposed by social action groups and jurists. In the words of Justice Chandrachud, the creed of the Paris Convention is the protection of private rights, not the securing of public interest. He who pushes India into the Paris Convention (now by incorporation by GATT) is less than patriotic and more than contra-constitutional. It is noteworthy that WTO incorporates the important Paris Convention provisions as we will presently see. Jurists have doubted the constitutionality of the "Paris" provisions, if forced on India.

The sky is the limit, so vast is the gamut of the WTO Final Act. But for the present, we may focus on a few important facets such as Trade-Related Intellectual Property Rights (TRIPS), Trade-Related Investment Measures (TRIMS) and Trade in Services. Of course, the Punta del Este declaration has expanded the mandate for negotiations much further. The U.S. mounted pressure, it being the principal beneficiary and was going through a grave trade recession, and the opposition by weaker countries began to crumble. Removal of farm subsidies, reduction of non-tariff barriers to trade and minimising restrictions on foreign investments (part of the Dunkel proposal) were meant to prise open Third World economies. Voices of protest were raised. An unlimited access to foreign enterprises and unlimited imports from foreign countries would benefit the industrialised countries and benumb indigenous industries and technological initiatives. But the then President George Bush said in 1990 "Our direction is open markets, expanding trade and negotiating a set of clear and enforceable

rules to govern world trade. This is the path to prosperity and growth and high employment. My top trade priority for this year is an ambitious multilateral agreement." Bush brashly added "this round of GATT is an ambitious undertaking—last best chance for the world to enter the next century with free and fair trade for all". President Bush held the view that America should have a historic single market in the whole world. What is good for America is good for making, appeared to be the Presidential vision of Mr. Bush and Mr. Clinton. Leading U.S. companies and business groups formed a high powered M.T.N. (Multilateral Trade Negotiations) Coalition. Thus America (Private) Ltd. entered the scene directly to campaign for global economic conquest under the GATT umbrella. The G-7 countries imparted political leadership to the cause of the Uruguay Round but the G-77 countries could not unitedly call the bluff of G-7 countries. A former U.S. Agriculture Secretary even said that "a successful end to the Uruguay Round negotiations is *ten times* more important to the U.S. than good relations with the Soviet Union". The liquidation of the Soviet Union made a qualitative change in the resistance to the U.S., and the increasing recession in the American economy made GATT success a matter of life and death for the U.S. An aggressive change in the U.S. pressure, with vociferous threats of unilateral action like Super 301 and Special 301, made India and other countries jittery. One after another the Third World countries fell under the circaan spell of Dunkel. India realised the dangers of the Dunkel Text but while the Opposition was mounting, Government was speaking in ambiguous diction. Eventually, without parliamentary approval or even comprehensive discussion, the Final Act was signed at Marrakesh. The post-Uruguay Round world will be divided into masters and slaves, haves and have-nots. How humiliating that despite global jurisdiction of W.T.O. and total liberalisation implicit in it U.S. refuses liberalisation and imposes unilateralism like Special 301. Textile quotas and Anti-dumping duties etc! This is double-speak hidden in the GATT as interpreted by the U.S.

It is in this background that a large democracy with a great cultural heritage and high potential resources, human and material, should dissect the obligations and advantages of the Final Act

not merely from the economic but also from the cultural and constitutional perspectives. What is unconstitutional is *non est.* Culture is a nation's soul.

What then is Bharat's economic culture in its fundamental facets? Nehru's words still hold good:

> "We do not believe in a rigid autarchy, but we do want to make India self-sufficient in regard to her needs as far as this is possible. We want to develop international trade, importing articles which we cannot easily produce and exporting such articles as the rest of the world wants from us. We do not propose to submit to the economic imperialism of any other country or to impose our own on others. We believe that the nations of the world can co-operate together in building a world economy which is advantageous for all and in this work we shall gladly co-operate. But this economy cannot be based on the individual profit motive, nor can it subsist within the framework of imperialist system. It means a new world order, both politically and economically, and free nations co-operating together for their own as well as the larger good."

The marathon Uruguay Final Act was endorsed by the Ministerial meeting held in Marrakesh on April 15, 1994 in the face of sharp popular opposition inside India (and agitation in several other countries) about signing the GATT Final Act. Yet India (Government) assented. Mickey Kantor, the USTR, expressed pleasure at the happy ending while Indian social activists and vast groups, political and other, raged and vowed to resist. 'Nobody lets India down like Indians' was one comment. Other criticisms have manifested themselves in bitter phrases like GATTastrophe but since our focus is on the constitutionality of the Treaty we need turn the lens only on the socio-economic and legal facets to the extent pertinent to our purpose. Even so, an abbreviated itemisation of the latest GATT prescriptions and proscriptions is necessary. Since the Indian Constitution is a socio-economic and political instrument GATT is a final global package and the total package is inseparable and all-embracing.

The Final Act contains legal texts which spell out the results of the negotiations since the Round was launched in Punta del Este, Uruguay, in September 1986. In addition to the texts of the

agreements, the Final Act also contains texts of Ministerial Decisions and Declarations which further clarify certain provisions of some of the agreements, and together they constitute the GATT law as it were. The broad structural projection of GATT 1994 and its transformation to the WTO (the key, all powerful multilateral institution of the future) is given as an introduction to the awesome halls of this new Treaty edifice. Marrakesh was witness to the World Trade Ministers' (including the Indian Commerce Minister) signatures approving over 20,000 pages of texts and tariff schedules. These plural plenty of signatures laid the ground work for the creation of a new international organisation, the World Trade Organisation (WTO) which on 1.1.1995 took over all the business from the then existed GATT Secretariat. The only issues, under pressure from the U.S., which were left open for future discussion, along with any other seminal suggestions from other countries, were the so-called 'social issues' like low wages for labour and the inimical effects on environment caused by trade. That the monopolists of U.S. found their hearts bleeding because Indian labour was paid low wages is a bio-economic paradox obviously concealing a sinister purpose. That purpose was to enable the TNCs of the U.S. to gain market access with ease into developing countries. When the TNCs and their governmental guardian say that the wages of Indian labour must be raised, their soul is soaked in profit-making and is not worried by Indian human conditions! The then Union Commerce Minister, in a couple of short U.S. friendly paragraphs in an article in the FRONTLINE summed up the essence of the new Treaty:

> "The crux of the treaty endorsed by representatives from about 120 countries and covering everything from apples to zinc, is the understanding on market access by which countries will cut tariffs on industrial and farm goods by about 37 per cent. Services such as banking, insurance, travel and movement of labour, constituting annual trade worth four billion dollars, will in the future be governed by the WTO. Countries with closed farm markets will have to import at least three per cent of the domestic consumption of the product concerned, going up to five per cent over six years.
>
> It also cuts trade-distorting subsidies for farmers. Poor nations (least

developed countries) are, however, exempt from the agricultural reforms, introduced into the agreement for the first time.

While import quotas on textiles and clothing will be phased out over 10 years, anti-dumping rules by which imports are priced below their value in the domestic market have been clarified. Intellectual property rights guaranteeing greater protection for patents, copyright, rights of performers and producer-members have been endorsed."
[FRONTLINE dt. 6-5-94, Pages 12—13]

Crocodile tears for lower wages in India is a U.S. lachrymal deception with intent to gain access to our markets on easier terms, say the critics and cynics.

The Final Act, signed by ministers from 117 countries, is now a challenge to Parliament when legislative bills are put through and face litigative scrutiny in the Supreme Court.

Chapter 4

India's Handling of the Uruguay Round Negotiations

This Chapter examines the Government of India's handling of the Uruguay Round negotiations not only in terms of the stance adopted on behalf of India, but whether the entire negotiating process was subject to the basic norms of transparency and accountability owed by elected representatives to the people in a democracy. It further examines whether adequate information regarding India's stance at the GATT negotiations, the position taken by other countries and the estimated impact of the treaty on India's political economy was provided to the people or their elected representatives which is essential for informed participation in a democratic political arena.

As discussed in the preceding chapter, the Uruguay Round commenced in September 1986 with the Punta Del Este Declaration. We begin our examination of the Government of India's stance qua the Uruguay Round of negotiations almost a year later, on August 4, 1987 with the Government's declaration that it had no intention to change the patent laws (Lok Sabha Qn. 1432). On 15 November, 1988, the Government reiterated its stance of no change in Patent laws (Lok Sabha Qn. 72). On 21st November, 1988, the Government denied that America had made proposals for amendment to India's Patent Laws but affirmed that America had made proposals under GATT "concerning norms and standards for protection of intellectual property rights" (Rajya Sabha Qn. 1444).

As discussed in the preceding chapter, at the official meeting at Geneva in April 1989, India capitulated to U.S. pressures and agreed to bring the new area of intellectual property rights within the scope of GATT. However, India's surrender was made without any consultation with Parliament or the States or any public discussion. Neither the Parliament, the President nor the States were briefed as to the reasons for the change in India's stance or the consequences of extending the ambit of GATT to substantive issues of intellectual property protection, an area falling within the sovereign decision making space of the member countries.

The Government's statements were limited to a wholly evasive and misleading reply given by the Minister of Commerce on April 24, 1989, that GATT entailed a framework for further negotiations with increased participation for developing nations (Lok Sabha Qn. 6513). On April 27, 1989 the Government made statements to the effect that, overall, developing nations would increasingly participate in trade (Rajya Sabha Qn. 61). But no position paper was publicly released explaining the reasons for the radical shift in India's stance and the likely impact of providing enhanced levels of intellectual property protection and libera-lization of investment and service industries demanded by the U.S. Essentially, the Union Government completely reversed its stand at GATT, abandoned its leadership of the developing countries and subjected its entire internal economy to external scrutiny and interference without ever explaining why.

On July 28, 1989, the Indian Government issued a Press Statement on its views on "Intellectual Property Rights—Standards and Principles" Concerning its Availability, Scope and Use—The Indian View" (See ANNEXURE-3). This Press Statement takes the view that the scope of intellectual property negotiations in the Uruguay Round is limited to "trade related intellectual property rights" which comprises only the restrictive and anti-competitive practices of the owners of intellectual property rights. The Press Statement further stated that any principle or standard relating to intellectual property rights should be tested against the touchstone of the socio-economic, developmental, technological

and public interest needs of developing countries: "it is therefore imperative that the protection of monopolistic rights of the patent owner is adequately balanced by the socio-economic and technological needs of the country." Essentially, the Press Statement was a staunch defense of the Indian Patents Act, 1970 in terms of working of patents, exclusions from patentability, limitation of food, pharmaceutical and chemical sectors to process patents, compulsory licenses, licenses of right and shorter duration of patents in developing countries. If anything, the Press Statement was a discourse on why intellectual property law in India was satisfactory and should be excluded from the ambit of the GATT negotiations.

On September 5, 1989, the Government of India submitted a paper to the GATT Secretariat titled "Applicability of the Basic Principles of the GATT and of Relevant International Intellectual Property Agreements or Conventions". This paper took the view that protection of intellectual property rights has no direct or significant relationship to international trade. Therefore, it would not be appropriate to establish within the framework of GATT any new rules and disciplines on intellectual property rights. The paper supported this view on the grounds that the basic principles of GATT, namely, national treatment and most-favoured-nation treatment are inapplicable to intellectual property rights. The paper further contended that nations should be left free to determine their own level of intellectual property protection because intellectual property systems confer extraordinary rights which have serious implications for the national economy and there is a close correlation between the level of economic, industrial and technological development of a country and the extent of intellectual property protection. This communique to the GATT Secretariat, like the Press Statement, makes a convincing case for leaving intellectual property out of GATT, and fails to explain why India agreed to discuss the issue at all.

Even though the previous government had succumbed to the U.S. demands to negotiate intellectual property rights under the aegis of GATT with and Special 301 investigations in the background, the new government that assumed office in December, 1989, apparently tried to recover the lost ground as would be

clear from various statements it made in response to questions raised in both the Houses of the Parliament.

On March 15 and 30, 1990, the Government stated ". . . that it will not participate in any negotiation . . . under threat of retaliation" (Lok Sabha Qn. 33 and 2873).

On March 19 and 27, 1990 the Government stated that there was no proposal to amend the Indian Patents Act which was a salutary legislation (Rajya Sabha Qn. 643 and 660; Lok Sabha Qn. 2221 and 2312).

On May 3, 1990 the Government stated that investment and services ". . . lie in the domain of sovereign decision making . . . not covered by GATT or any other multi-lateral or bilateral agreement" (Rajya Sabha Qn. 88).

On 4-10th May, 1990, the Government reiterated that ". . . it cannot enter into bilateral negotiations to change basic economic policies which are in the domain of our sovereign decision making, and that too, under threat of retaliation". India would provide support and leadership to the concerns of developing nations (Lok Sabha Qn. 7452; Rajya Sabha Qn. 7603).

On 4th and 11th May, 1990 the Government maintained that the intellectual property laws are adequate (Lok Sabha Qn. 7452, 8442 and 8443).

On May 11, 1990 the Government was hopeful that the GATT Negotiations would result in a "balanced outcome" for developing countries; and ensure that India's interests were safeguarded (Lok Sabha Qn. No. 8334).

On 17th May, 1990 the Indian Government repeated, "The Indian delegation also reiterated its stand that it would not negotiate under the threat of retaliation under Super 301 (Rajya Sabha Qn. 221).

On 9-10 August, 1990, the Government reported that there would be no negotiations under threat of retaliation but admitted that the U.S. had stayed its hand because of India's potential" through (its) participation . . . in negotiations on (TRIMS and Services)" (Rajya Sabha Qn. 46; Lok Sabha Qn. 883).

On 31st August, 1990, the Government admitted that the comprehensive package of the developed nations in GATT "did

not . . . take our development and other concerns fully into account." The Government claimed that India had "held its position" in GATT and much depended on the ability of the developing nations to "stand together and firmly" in the final phase of negotiations"...

In another statement it was also repeated that India will not negotiate under threat of retaliation (Statement in reply to Lok Sabha Qn. 3868).

On 28th December, 1990, the Government declared that its stance in GATT was that developing countries are different and unique and that Indian labor should be able to travel to industrialised countries temporarily. Aspects of India's tentative position were stated in one line policy statements on textiles, patents and services. (Lok Sabha Qn. 382).

However, with the change of Government in June, 1991, a process of adjustment and reversal seems to have resumed once again.

By 16th July, 1991 the stance that India would not negotiate under threat of retaliation was softened and India simply "regretted the unilateral decision of the U.S. while these issues are already being negotiated" (Rajya Sabha Qn. 127).

On July 19, 1991 the Government talked of "different perceptions on patent and trademarks" from the U.S.; but took no stand. (Lok Sabha Qn. 418).

On 11th September, 1991 the Government reiterated that there was no proposal to amend the Patents Act (Lok Sabha Qn. 6771) but stopped short of reiterating the position that the present law was adequate.

On 25th December, 1991, the Government admitted that the Dunkel proposals would fundamentally alter various aspects of the economy including patents.

Thus, it is evident that during the first five years of the Uruguay Round, the Indian Government failed to make any substantive policy statement to Parliament, the State Assemblies, the Chief Ministers or the people. The Union Government failed to issue any position paper detailing the status of the negotiations, the position taken by various countries, the proposed changes to domestic legislation and anticipated consequences of signing the

new treaty on the domestic economy. The only statements made consist of the Press Statement and the Submissions to the GATT Secretariat discussed above which failed to explain why India agreed to widen the scope of the Uruguay Round to include matters which fall squarely within the ambit of internal regulation. Out of concern for the impact of the new treaty on the economy and democratic institutions, in September 1991, over 250 Members of Parliament and other prominent citizens issued a public statement on the Uruguay Round and Special 301.

Despite the growing public concern over the Uruguay Round, the Union Government failed to convene any domestic discussion of GATT or release any briefing papers on GATT at all until after the issuance of the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ("Dunkel Draft") in December 1991 which, notably, was a comprehensive single package penultimate draft that had to be accepted in its entirety, if at all. Indeed, the very first page of the several hundred page Draft Treaty states that "No single element of the Draft Final Act can be considered as agreed till the total package is agreed." The Draft Treaty exemplified realpolitik: take-it-or-leave-it. Nonetheless, the Union Government was moved to initiate some form of discussion at home only after the Draft Treaty was issued. However, by this stage, the time of taking a stance was substantially over. Moreover, the steps taken by the Government after December 1991 barely disguised the fact that the Government intended to comply with the U.S. demands at GATT regardless of what Parliament, the States or the public had to say.

In January 1992, the Government appointed a Committee of Ministers to examine the GATT issues. The Committee of Ministers failed to hold any sessions in public. It is not clear if the evidence presented before the Committee was recorded; and, if so, what became of the record. The Government never took a stance before the Committee. The secrecy of the Government about its own position and of the Committee about its own deliberations made the entire exercise valueless as democracy and a fraud on governance. The Committee of Ministers never published its deliberations or a report.

In June 1992 , the Ministry of Commerce privately circulated

a paper titled "The Uruguay Round of Multilateral Trade Negotiations—A Paper for Discussion". It is important to note that this Paper does not contain any policy statement of the Government and gives no indication of the positions of other nations in the negotiations.

On 21 October, 1992, Shri Jyoti Basu, Chief Minister of West Bengal wrote a letter to the Prime Minister (Do No. 233—CM) as reproduced hereunder:

"Dear Prime Minister:

It has been brought to my notice that the Government of India is under pressure from various agencies both bilateral and multi-lateral to accept the "Dunkel Draft"–the proposals as forwarded by the Director-General of GATT, Mr. Arthur Dunkel. Acceptance of these proposals will have far reaching implications in our economic development and the future path that the country will follow. The matter has also been agitated by the intelligentsia and scientists in various forums. A number of letters have also been received by me expressing strong objections against these proposals. In the overall interest of the country, I feel that the States must be consulted formally and their views obtained before a final decision is taken."

With regards,

Yours sincerely,
Jyoti Basu

Shri P.V. Narasimha Rao,
Prime Minister of India, New Delhi

The Prime Minister failed to respond to the letter of Shri Jyoti Basu and the Union Government proceeded with the GATT negotiations without consulting or obtaining the consent of any of the States.

On December 23, 1992, in a short debate in the Lok Sabha, Members of Parliament protested the lack of discussion and information and the government's cavalier attitude. A Member of Parliament (Shri Somnath Chatterjee) demanded to know the Government's stance in the GATT negotiations and complained that Parliament had been kept in the dark regarding the status of the negotiations. He further urged the Prime Minister to appear before Parliament to discuss the matter. Despite the request for a full briefing, the Union Government did not provide Parliament with the information sought.

On January 27, 1993, leaders of various political parties including Sarvashri Harkishan Singh Surjeet, Chandra Shekhar, Indrajit Gupta, Tridib Chaudhuri, Chitta Basu, Murasoli Maran and V.P. Singh wrote a joint letter to the Prime Minister which expressed the view that the Dunkel Draft would have an inimical impact on the economy and demanding setting up of a Joint Parliamentary Committee to examine its implications. In addition, 250 members of Parliament, including Congress party members, and prominent citizens issued a joint public statement on the Uruguay Round of GATT Negotiations and the Special 301 provision of U.S. trade laws. However, the Government refused to respond to these demands for information and consultation by members of Parliament, politicians and citizens groups despite the irreversible impact of the Dunkel Draft on the Indian political economy.

Again, on 28th August, 1993, the Members of Parliament protested against the lack of debate on the Dunkel Draft. Although the Prime Minister appeared before the Lok Sabha, the discussion on the Dunkel Draft was raised on the last day of the Parliamentary session after 6 o'clock. Shri Chandra Shekhar demanded that an assurance would be given that the Government would not take a decision before the Dunkel Draft was discussed in the Lok Sabha. In response, there was no asssurance from the Prime Minister that the Dunkel Draft would not be finalised without Parliament's consent. On the contrary, the Prime Minister, P.V. Narasimha Rao, stated that the international negotiations were going forward and the Government would not wait for a Parliamentary debate:

THE PRIME MINISTER (SHRI P.V. NARASIMHA RAO):

"...What the Hon. Members want me to do is that we will not go on with the negotiations; everything will be kept in cold storage until we discuss it. I beg of you, I beg of the Members to discuss it as quickly as possible. This is an international convention that is going on there, negotiations are going on there; may be they will also be delayed. But how can we lock this up depending on this?"

"But the point is, no guarantee can be given. It is quite possible that we may also try to have a little more time there. Yes; but beyond that, it is not possible."

(Excerpts from Lok Sabha Debates, 28.8.93).

The level of information provided by the Government in respect of implications of the Dunkel Draft has been particularly inadequate. After the restricted circulation paper of the Ministry of Commerce issued in July 1992, a similar restricted circulation paper was also written on "Implications for India of the Dunkel Proposals on Trade in Agriculture". This paper admitted that problems can arise from the Dunkel Draft and various understandings and improvements were necessary. However, this document does not amount to an analysis or an impact statement.

In September, 1993 a public document was issued to the members of Parliament by the Ministry of Commerce entitled, "The Uruguay Round of Multilateral Trade Negotiations: A Background Paper of Discussion". The paper attempted to obscure the reality that the penultimate stage of the negotiations has already been passed by stating that the "question of taking a final view on the Dunkel proposals has not yet arisen as these things are still being negotiated."

During the week of December 6, 1993, Members of Parliament made numerous demands for information and discussion on the Dunkel Draft Treaty. When the Government refused to comply with these demands, many members of the Rajya Sabha walked out in protest. The only statement forthcoming from the Government was the outright refusal by the Commerce Minister to discuss the Dunkel Draft Text in Parliament before accepting it. Despite the appearance of the Commerce Minister before Parliament on several occasions before the December 15, 1993

deadline for accepting the Dunkel Draft Treaty, the Government failed to make any coherent analysis which explained the basis for the Government's claim that India has more to gain than lose by accepting the Draft Treaty.

The Union Government's analysis of the benefits to be gained by India by accepting the Final Act was limited to a citation from a report of the Organization for Economic Cooperation and Development (OECD):

> "...one study has been made by OECD which I would like to share with the Members. According to that, the increase in the volume of world trade, at the current price level would be 270 billion dollars more . . . it would be in the coming five to six years, after the implementation of this programme and India, even with the present level of export share of 0.5%, would be a beneficiary to the extent of 4.7 billion."
>
> (Parliamentary Record, 10.12.93, Statement of Commerce Minister, Pranab Mukherjee, pg. 2983)

On December 14, 1993, the Department-Related Parliamentary Standing Committee on Commerce of the Rajya Sabha, chaired by Shri I.K. Gujral (hereinafter "Gujral Committee") issued its "Third Report on the Draft Dunkel Proposals" (hereinafter "Gujral Report"). The Gujral Committee based its findings on oral and written evidence submitted by a cross-section of individuals and organisations, including several Ministries in the course of 24 sessions.

The Gujral Committee examined the six critical subjects of the Dunkel Draft—Agriculture, Trade-Related Aspects of Intellectual Property Rights (TRIPS), Trade-Related Investment Measures (TRIMS), the General Agreement on Trade in Services (GATS), Textiles and Clothing, and Institutional Arrangements, namely, the operation of the successor organisation to the GATT, then known as the Multilateral Trade Organization (MTO). In each of these areas, the Gujral Report concluded that the provisions of the Dunkel Draft would adversely affect India. The conclusions of the Gujral Committee are summarized below:

AGRICULTURE

In the area of Agriculture, the Gujral Committee Report found that the 10% limit on domestic subsidies would "discriminate against Indian agriculture" and have "grave implications for poor resource farmers because with increasing cost of energy and other inputs the sector wise subsidy may exceed this limit" (para 116). The Report further found that compliance with the market access requirements "could enable the developed countries to capture the food markets of developing countries and also to control the gene sequences, microbiological resources and genetic engineering. This could adversely affect their agriculture and food production" (para 117).

The Gujral Committee expressed doubt with respect to the Government's claims that, despite the intellectual property rights or *sui generis* protection which would be accorded to seeds under the Dunkel Draft, it had reached an informal understanding that farmers would still be able to engage in the traditional "across the fence" exchange of seeds. The Gujral Committee opined "that these safeguards should find specific mention in the GATT. An informal understanding in this regard that the Ministry of Commerce may have obtained from the industrialised countries collectively or on bilateral levels may not serve the purpose in days to come" (para 123).

TRIPS

According to the Gujral Committee, the TRIPS Agreement is an attempt by the industrialised countries to strengthen their monopoly over technology regardless of the fact that such an approach is protectionist, anti-competition and anti-liberalization.

The Gujral Committee expressed concern that the TRIPS Agreement would have a "grave impact" on drug prices and posed the danger that the indigenous drug industry would be "gobbled up by the foreign multinationals. The primacy of public interest over the rights of the patent holders should be ensured" (para 196). The Gujral Committee further found that the provisions in

the TRIPS Agreement which treat importation as working of the patent would impair technology transfers thereby defeating the Government's initiative to modernize Indian industry (para 198). The Gujral Report concluded that:

1. Indian patent law has been rightly emphasizing patenting of the process and not the product, this should be maintained;
2. The proposed extension to 20 year period virtually discourages R&D and should not be conceded;
3. India should insist for grant of automatic licensing in certain circumstances;
4. Micro-organism and biological process should be kept out of the patent regime. (para 197).

TEXTILES

The Gujral Committee found that the Textiles will not allow India to reap potential gains from trade:

"The Committee is of the view that India should explore possibilities to get reasonable improvements in the Textiles Text. This is one of the areas where the country's interest from a liberalized trade is clearly visible and there should be efforts to ensure that the potential gains are realised." (para 217).

TRIMS

According to the Gujral Committee, the motivational force behind the TRIMS Agreement is that "The Transnational Corporations were also keen to have a free regime for moving capital in search of higher profits without hindrance of the national governments who may have their own ideas of national goals or social priorities" (para 25). The Gujral Committee expressed concern over the fact that the TRIMS Agreement restricted the power of the Government to regulate and control foreign investment. The Committee concluded that,

"provisions of Dunkel Draft grant foreign investors advantageous position vis-a-vis our investors, the foreign investors, enjoying full freedom to operate with backing of their Governments and low interest rates, would not be obliged to abide by the local content regulations or to make compulsory exports" (para 224).

GATS

The Gujral Committee opposed opening up the services sector where there are no economic advantages and which may militate against domestic enterprises. The Committee concluded:

"In any case no access should be offered as a matter of right in spheres of banking, insurance and telecommunication services. The Committee is of the view that Government should strive to get such exceptions incorporated in the GATT text." (para 231).

The Committee also expressed concern over the discriminatory form of liberalization under GATS in that while capital movements would become unrestrained, labor would not:

"The Committee views with concern the unbalanced nature of GATS which while allowing for unrestrained flow of capital—related services said little about the labor-related services. The Committee is of the opinion that a balanced Agreement on Trade in Services is necessary before liberalization of the services sector in developing countries could take place." (para 232).

INSTITUTIONAL ARRANGEMENTS—MULTILATERAL TRADE ORGANISATION

According to the Gujral Committee, the provisions allowing cross-retaliation were "heavily-loaded" against developing countries like India despite the Government's claim that, unlike the Super 301 clause which was subject solely to the discretion of U.S. authorities, cross-retaliation would only be allowed after obtaining multilateral

authorisation. According to the Gujral Committee, the cross-retaliation provisions would have a discriminatory impact in that developing countries like India have no means to retaliate against the developed countries (para 241). The Committee recommended that, "such provisions which will have far reaching implications should not be accepted" (para 240).

In sum, the Gujral Committee found that each of the critical areas of the treaty will be detrimental to the future growth of Indian industry, subject the Indian market to take-over by transnational corporations, and have adverse social welfare consequences in terms of the availability of cheap medicines and affordable food for the majority of the people.

On December 15, 1993, the Uruguay Round drew to a close. The GATT Secretariat issued the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" which supplanted the Dunkel Draft. The negotiating countries undertook to submit the Final Act to their respective governments for approval.

Soon after taking over the office as Chief Minister of Rajasthan, Shri Bhairon Singh Shekhawat wrote a letter to the Prime Minister that in keeping with the spirit of the federal structure and particularly on a matter which affects the vast majority of agriculture community, the State Government should have been consulted over the proposals having far-reaching implications. The fears expressed at different forums are important and requested that a dialogue between the Central Government and the State Government be immediately initiated at his level before the Central Government finalises its stand on the Dunkel Proposals. The said letter reads as follows :

CHIEF MINISTER
RAJASTHAN

D.O. No. PS/APS/93/1430
December 10, 1993

Dear Shri Prime Minister

I have been following the debate on the Dunkel Draft Proposals in the Press with keen interest. Since taking over as Chief Minister, I have had the entire subject examined and have found that although the constitutional provisions do entitle the Central Government to legislate on a State subject like Agriculture in order to give effect to an international agreement, yet, in keeping with the spirit of our federal structure, and particularly on a matter which affects the vast majority of the agricultural community in the country, the State Government should have been consulted over these proposals which have far reaching implications.

2. I feel it is imperative that the fears expressed at different fora are allayed, for which a dialogue between the Central Government and the State Governments is immediately initiated at your level before the Central Government finalised its stand on the Dunkel draft proposals.

Yours sincerely,
(Bhairon Singh Shekhawat)

Shri P.V. Narasimha Rao,
Prime Minister of India,
NEW DELHI.

On 17.12.93, the Hon'ble Chief Minister of Rajasthan sent a communication to all the Chief Ministers of all the States in the Union of India enclosing the copy of his letter dated 10.12.93 to the Hon'ble Prime Minister.

CHIEF MINISTER
RAJASTHAN

D.O.No. F.12(36)Agri.1/NC/90

December 17, 1993

Dear

The Dunkel Draft Proposals has been debated in the press for some time. Since Agriculture is a State subject, I felt the State Government should be consulted on the same before the Central Government finalises the Agreement. I have accordingly addressed a letter to the Prime Minister in this regard.

Enclosed please find a copy of my letter for information and any action you deem fit.

With regards,

Yours sincerely,

(Bhairon Singh Shekhawat)

All Chief Ministers

On December 30, 1993, the Chief Minister of Orissa, Sh. Biju Patnaik wrote a letter to the Prime Minister of India which suggested that "in view of the serious implications of the Dunkel proposals in areas like agriculture, textiles, drugs and pharmaceuticals and Trade Related Intellectual Property Rights, implications of these proposals should be debated extensively in the country." The Hon'ble Chief Minister demanded that "The State Governments should be consulted in the matter, and the

Central Government should open an immediate dialogue to allay any misgivings in the matter."

On January 4, 1994, the Chief Minister of Tamil Nadu, Smt. Jayalalitha, wrote the following letter to the Prime Minister of India:

> "The Chief Minister of Rajasthan has written to you on the 10th November 1993 suggesting that the dialogue be initiated between the Central Government and the State Governments to examine the implications of the GATT with regard to agricultural policies and programmes of the Government of India and the State Governments. Though the Government of India has tried to allay the misgivings with regard to the impact of the Dunkel Draft on agriculture, I still feel that the issues should be discussed in a meeting to be convened by the Central Government with the Chief Ministers of the State Governments wherein the matter can be discussed and the apprehensions can be removed. I consider that this is necessary because agriculture is a State subject and the State Governments would have to deal with the problem that may be brought about by India's acceptance of GATT."

Receiving no reply, again on March 4, 1994, the Chief Minister of Tamil Nadu wrote to the Prime Minister requesting him to convene a conference of Chief Ministers to discuss the Final Act. No reply was received from the Prime Minister.

On March 18, 1994, the Chief Minister of Orissa again wrote to the Prime Minister demanding that the State Governments be consulted "in view of the far-reaching adverse implications of Dunkel and GATT proposals." However, no reply was received from the Prime Minister.

Since March 1994, the Government has begun to introduce legislation which would amend existing Indian laws in compliance with the requirements of the Final Act. In April 1994, the Government privately circulated a draft Plant Variety Protection Act which would create *sui generis* protection of plant varieties in compliance with the TRIPS Agreement. In June 1994, the Government passed the Copyright (Amendment) Act, 1994 which made several changes to Indian Copyright law in compliance with the TRIPS Agreement. In September, 1994, the Government

issued a new drug policy which significantly reduced the types of drugs under price control. The Government indicated that a new patents legislation and plant varieties bill are on the anvil during the winter 1994 session of Parliament. However, instead of bringing up the bill in the Winter Session, the Government decided to deliberately delay the matter for a while after that Session and promulgated an Ordinance amending the Patents Act, 1970 on December 31, 1994. Later, the Government had a tough time in Parliament in replacing the Ordinance by an Act. The Bill amending the Patents Act, 1970 is still pending with Rajya Sabha and its select Committee. This clearly indicates that the Government was in the process of amending existing Indian laws even before the Final Act was scheduled to come into force by January 1, 1995.

Chapter 5

Summary of the Critical Sections of the Final Act and Their Implications

The signing at Geneva and later at Marrakesh of the GATT (WTO) Treaty signify a signal victory for the major economic powers and rightly described by Peter Sutherland as "a defining moment in history". The ministerial signatures at Marrakesh have created a new World Trade Order with formal equalite for all but unequal impacts on the North and the South.

As we read the terms of the enormous instrument of global coverage a certain incongruity between its philosophy and the ethos of our Constitution becomes apparent.

GATT 1994 rides rough-shod over federalism in India, ignores the basic structure and the Preambular undertaking of our *suprema lex* and runs counter, in many other ways, to the crimson constitutional provisions, because its vision is not on Indian humans' happiness but money-making markets made up of 200 million strong middle and upper classes who could be seduced by market-friendly methodology. Marketise and conquer, man does not matter—that is the 'logos' of the Treaty; economics where humans matter is the social thrust of our Constitution. Can this GATT process be anything more than pulling the wool over the eyes of the Indian people? That is the great issue.

Before a longer analysis of the GATT Final Text, one may for brevity state the teleological trinity of purposes viz. Trade Related Intellectual Property Rights (TRIPS), Trade Related Investments

Measures (TRIMS) and Trade Related Services (GATS). The enforcement of the several agreements including watchdoging the obligations undertaken by Nations is operated by the World Trade Organisations (W.T.O.). The critical part of the exercise is to ascertain whether GATT will subvert our Constitutional Order or conforms to the basic values of our National Charter.

It has often been said that we are governed by the Constitution, but the Constitution is what the Judges say it is. That is why the Supreme Court which is our Judicial Supremo will ultimately has to pronounce on the raging controversy round the text of the Uruguay Round. Certainly we must respect the commitment already made in a provisional sense by India at the governmental level. But it does not follow that an irreversible surrender of India's interests has been or could be signed away by a minister. Why? Because it is beyond the Cabinet to jettison the Constitution or to treat a treaty to operate as a coup. Economists and administrators, ministers and politicians certainly can express opinions about how far trade and development will advance or retard thro' GATT. But the last word belongs to the Constitution as interpreted by the final court; and so, the ultimate fate of the Final Act and all the 29 instruments under it, *in relation to India*, turns on the verdict of the Court, not the policies of the Central Government, the polemics of political Parties or the publicity of the media. Sure, courts will certainly take these into consideration, to the extent relevant, to test the vires of the impugned GATT regime 1994.[1] The totality of the text with all the agreement, annexes and the potential jurisdiction of the W.T.O. run into endless pages. Since India will be bound by the clauses however long and complex, Indian in their millions would necessarily have to know whether the New World Trade Order will blind them and foot or promote their well-being in tune with the

1. There are three suits filed by States of Tamil Nadu, Rajasthan and Orissa, against the Union of India in 1995 which are pending determination. Several cases had also been filed in the High Court and Supreme Court which await decision. We hope that these will not be treated as infructuous and the Supreme Court will elucidate the impact of the Treaty Making power on the federalism and social justice provisions of the Constitution.

Constitution. Summary of the critical sections of the Final Act and their implications are now stated in this Chapter.

I

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)—Patents

MAIN PROVISIONS

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires countries to provide patent protection for all products or processes in all fields of technology, provided they are new, contain an inventive step and are capable of industrial application for 20 years from the date of filing of application. Patents shall be available without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced[2].

Exclusions from Patentability

Countries may exclude from patentability inventions necessary to protect public order or morality or protection of human, animal or plant life or health or to avoid serious prejudice to the environment provided that the exclusion is not made because exploitation of the patent would violate domestic law.[3]

Countries may also exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.[4] Exclusions may also be made qua plants and animals other than microorganisms and essentially biological processes

2 TRIPS, Art. 27.1, 33.
3 TRIPS Agreement, Art. 27(2).
4 TRIPS Agreement, Art. 27.3(a).

for the production of plants and animals other than non-biological and microbiological processes. However, countries shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or any combination thereof. These provisions will be reviewed in 1999.[5]

Use without Authorization of the Patent Holder

A patented invention may be allowed for other use (other use refers to use other than allowed under Article 30) without the authorization of the patent holder if the following conditions are satisfied.[6] First, the applicant seeking use must have approached the patentee and sought a license on reasonable commercial terms and conditions which was not granted within a reasonable period of time. This condition may be waived during a national emergency or with respect to public non-commercial use. However, even in the case of a national emergency, the patentee must be informed as soon as reasonably practicable. In the case of public non-commercial use, where the government knows that a valid patent will be used by the Government, the patentee should be informed promptly.[7]

The use will be non-exclusive and non-assignable. The scope and duration of the use will be limited to the purposes for which it was authorized. When the circumstances which led to the authorization cease to exist, the use may be terminated. In the case of semiconductor technology, the use shall be limited to public non-commercial use or to remedy a practice determined after judicial and administrative process to be anti-competitive. The use shall be authorized predominantly for the supply of the domestic market.

The patentee shall be entitled to adequate remuneration in the circumstances of each case taking into account the economic value of authorization. Both the legal validity of the authorization of use without the approval of the patent holder and any decision relating to remuneration shall be subject to judicial review.

The foregoing conditions (except for those on termination,

5 TRIPS Agreement, Art. 27.3(b).
6 TRIPS, Art. 31.
7 TRIPS, Art. 31(b).

remuneration and judicial review) shall not be applicable to use permitted to remedy a practice which is found after judicial or administrative process to be anti-competitive. The amount of remuneration shall depend on the need to correct anti-competitive practices.

If the authorization is granted to allow use of a second patent which cannot be used without infringing a first patent, the following additional conditions shall apply: (i) the second patent shall involve an important technical advance of considerable economic significance; (ii) the owner of the first patent shall be entitled to a cross-license of the invention covered by the second patent; and (iii) use authorized in respect of the first patent shall not be assignable without assignment of the second patent.

Process Patents

In civil proceedings, judicial authorities may order a defendant to prove that the process used to obtain an identical product is different from a patented process. An identical product shall be deemed to have been obtained by the patented process where the product is new, there is a substantial likelihood that the identical product was made by the patented process and the patentee is unable through reasonable efforts to determine the process actually used.[8]

Transition Period

The TRIPS Agreement contains a number of transitional provisions that, when read together, create the following obligations for India:

By January 1, 1995, India must provide a means by which product patent applications over pharmaceutical and agricultural chemical products can be filed.[9] India must grant five year exclusive marketing rights after obtaining marketing approval in India with respect to the pharmaceutical and agricultural chemical products with respect to which an application has been filed provided that a product patent and marketing approval have been granted in

8 TRIPS, Art. 34 (1)
9 TRIPS, Art. 70.8 (a).

another member country and marketing approval has been obtained in that country.[10]

In the year 2000 as per TRIPS Agreement India must apply the criteria for patentability to the applications for pharmaceutical and agricultural chemical product patents that have been filed.[11] India must also provide effective *sui generis* protection of plant varieties unless it opts for plant patents. In addition, India must conform to the provisions on process patents in the TRIPS Agreement including pharmaceutical and agricultural chemical processes. India must adhere to the TRIPS Agreement's provisions on product patents except over pharmaceutical and agricultural chemical products.

In the year 2005, India must grant product patents over pharmaceutical and agricultural chemical products. The patent terms will run from the date the application was filed (i.e. some time after 1995) to 20 years thereafter.[12] Therefore, if a patent application was filed in 1996, the patent term will expire in 2016 although the patent was only granted in 2005.

There will be no obligation for restoration of protection to subject matter which has fallen into the public domain on the date of application of TRIPS Agreement which will be the year 2000 for India.[13]

If any activity has commenced before 1995, in respect of which significant investment has been made and have become infringing under legislation implementing the TRIPS Agreement, India may provide for a limitation of remedies for continuation of the manufacturing activity after 2000. However, the patentee shall receive at least equitable remuneration.[14]

CHANGES TO EXISTING PATENT LAW

The Patents Act, 1970 made certain areas unpatentable including

10 TRIPS, Art. 70.9.
11 TRIPS, Art. 70.8(b).
12 TRIPS, Art. 70.8(c).
13 TRIPS, Art. 70.3.
14 TRIPS, Art. 70.4.

those relating to agriculture or horticulture and processes for the medicinal, surgical, curative, prophylactic or other treatment for humans, animals and plants or to increase their economic value or that of their products (Section 3). The view underlying the exclusions was that living creatures are not treated as invention and should remain in the public domain and not be subject to proprietary rights. In sharp contrast, non-biological processes for the production of animals or plants are patentable under the TRIPS Agreement and plant varieties must be protected either by patents or by an effective *sui generis* system.

The Patents Act, 1970 limited foods, drugs and medicines to process patents of five to seven years duration (Section 5). This directly conflicts with the TRIPS Agreement requirement that 20 year product patents be granted without regard to field of technology.

The Patents Act, 1970 made it clear that a patent was not an antecedent right but subject to conditions (Section 47) and provided for compulsory licences, licences of right and revocation of patents where the patented invention was not made available to the public at a reasonable price (Sections 84-90). The Patents Act, 1970 required working of patents and prohibited their use as import monopolies. In sharp contrast, the TRIPS Agreement does not provide for compulsory licences or licences of right and allows a patent to be used as an import monopoly. The TRIPS Agreement allows use without the authorisation of the patent holder under severely circumscribed conditions which include payment of remuneration to the patent hold and mainly for non-commercial purpose.

In sum, the TRIPS Agreement will require repeal of all the critical provisions of the Patents Act, 1970, including exclusions from patentability for plants and animals, limitation of food, medicine and chemicals to process patents of five to seven years, compulsory licensing, licences of right and revocation of patents.

Thus among the most deleterious items urged by many opponents of GATTism is the Dunkel diktat on Trade Related Intellectual Property regime. Knowledge is power, but power must be a universal blessing rather than an exploitative monopolistic property. That is why in the famous lines of the Gitanjali, Tagore

sings: "Where knowledge is free . . . into that heaven of freedom, my father let my country awake". In a sublime sense, therefore, privatising innovations and inventions and other discoveries of the human mind, which add to the happiness of mankind, is obnoxious. Even so, intellectual property is being claimed as private with money-bees and corporate power claiming property rights over discoveries. Inventions and innovations, technological breakthroughs and other new scientific insights are rendered possible by the ideas and earlier levels of scientific work during previous eras without which the new science and technology could never have taken place. The present researchers owe so much to their predecessors that private property in the technological advance is a false claim ignoring our ancestors' contribution.

IMPLICATIONS FOR DRUG PRICES AND AVAILABILITY

The Patents Act, 1970 is directly responsible for the fact that drugs and medicines are available at low prices in India and that India is self-sufficient in production of basic drugs covering various therapeutic groups. The limitation of drugs and medicines to process patents of five to seven years duration enabled scientists to develop alternate processes for production of life saving drugs which, in turn, permitted development of a domestic pharmaceutical industry in India in a relatively short period of time. Consequently, the production of pharmaceutical products in India has grown almost sixteen times: from Rs. 500 crores in 1974 approximately to over Rs. 8000 crores (estimated) in 1994-95. There has also been a sharp increase in exports: between 1985-86 to 1994-95 exports have grown from Rs. 140 crores to over Rs. 2000 crores (estimated) in this sector. Significantly, out of the top five pharmaceutical companies in India, only one, Glaxo, is an affiliate of a multinational corporation, the rest are all Indian Companies.

Under the TRIPS Agreement, medicines will be protected by product patents; consequently, Indian companies will no longer be able to produce new drugs invented abroad merely by finding

an alternate process for its manufacture. Furthermore, the reversal of the burden of proof and presumption of infringement will discourage Indian drug manufacturers from using even a novel process for making a drug because of the fear that there is a patented process, albeit different from the one used, which can produce the identical drug. Since it was the use of novel processes which enabled India to develop an indigenous pharmaceutical industry, the TRIPS Agreement will adversely affect the development of the Indian drug industry.

The 20 year product patents over drugs and medicines provided by the TRIPS Agreement will have an immeasurable effect because most drugs sold in India in the major therapeutic groups are protected by patents. As shown in Table D, the vast majority of drugs sold in India will be affected by the 20 year product patents available under the TRIPS Agreement.

Table D Share of Patented Drugs in India

Therapeutic Groups	% under Patents
1. Antibiotics	40.23
2. Antibacterials	98.80
3. Systemic Antifungals	25.66
4. Anti-Leprotics	69.96
5. Cardiovasculars	40.18
6. NSAIDS	22.16
7. Tranquilizers	74.42
8. Anti-Convulsants	65.93
9. Antipeptic Ulcer Drugs	65.92
10. Oral Anti-Diabetics	55.30
11. Anti-Asthmatics	47.53
12. Anti-Histamines	21.34
13. Cytostatics & Anti-Leukemics	32.41
14. Contraceptive Hormones	88.79

(*Source:* B.K. Keayla, Biswajit Dhar, "Indian Pharmaceutical Industry and Patent Regime for Drug Security," National Working Group on Patent Laws: Sept. 1993).

The 20 year product patents provided by the Final Act will confer excessive monopoly power on drug companies. Twenty

years of exclusive market power far exceeds the time necessary to promote innovation by allowing the inventor to recover the costs of developing new drugs from profits on sales. The 20 years of monopoly rights, which may be extended by obtaining a process patent, an improvement patent and brand loyalties, are not necessary to recover research and development costs. In fact, a company often earns enough profit from the sale of a drug in one year to pay the entire research and development costs. For example, "Zantac," a drug sold by Glaxo had a turnover in 1992 of $4,011 million and the return on worldwide sales of pharma products enjoyed by Glaxo was 35.6%. The cost of new product research and development is generally estimated by the drug industry itself to be $100 - $150 million. Therefore, Glaxo's product development costs were less than 5% of one year's turnover and well below the net return enjoyed by the company in that year. In fact, the 20 year patent term confers excessive monopoly rights on drug companies. This monopoly power will be used to make drug prices as exhorbitant in India as they currently are in countries such as the U.S., U.K. etc.

The 20 year product patent protection of drugs and medicines under the TRIPS Agreement will cause the price of medicines to skyrocket. After passage of the Patents Act, 1970, drug prices fell to being among the lowest in the world. Today, drug prices in India range from 5 to 30 times lower than in countries with product patents. Prices in India are from 900% to 3010% lower than U.S. Prices for the same drugs. Repeal of the Patents Act, 1970 by the TRIPS Agreement will create a situation similar to that existing under the colonial Patents and Designs Act of 1911 when, according to the Kefauver Committee of the U.S. Senate, drug prices in India were "among the highest in the world" and multinationals used patents as import monopolies that precluded manufacture of medicines in India.

In addition to the high prices, the lack of availability of essential drugs under the colonial Patents and Designs Act of 1911 will return to plague India because, like the 1911 legislation, the TRIPS Agreement does not require a patentee to manufacture an invention in India. The colonial Patents and Designs Act of 1911 permitted foreign countries to block India's access to the

latest antibiotics and other critical therapeutic discoveries. Between 1947-1957, 99% of the 1704 drug and pharmaceutical patents in India were held by foreign citizens and less than 1% were commercially exploited in India. (Dr. Nitya Nand, "Patent Laws: The Indian Experience", National Working Group on Patent Laws: December 30, 1990). The lack of access to new drugs, even by imports, will adversely affect health programmes in India.

HEALTH FOR ALL

The right to medical care for the humblest citizen is integral to evolving an international health order. The Alma Ata Declaration (1979), in which 134 nations including India pledged urgent action to protect and promote health and the resolution of the 38th World Health Assembly to give this promise practical shape, are some of the international instruments to secure good health for all humanity. Can GATT scuttle Alma Ata and Art. 21 without fatal flaw?

The WHO has also enumerated guidelines for establishing a national programme for essential drugs for developing countries even as the Hathi Committee has. These national and international documents are the sinews of a maturing world health order and supportive global jurisprudence.

The Centre's statement on the national health policy in 1982, following the Hathi Committee report of 1975, and the latest restructuring of the 20 point programme, could become the foundation of programmes that would grant equal popular access to those curative pharmaceutical advances which are now cornered only by the dominant section of our society who alone can reach the MNC pharmacopea. To whittle down the present Indian conditionalities regarding patents is to wound the human right to health and life.

The main recommendations of the Hathi Committee were nationalisation of multinational drug companies; establishment of national drug authority; priority production of 116 essential drugs; abolition of brand names and introduction of generic names; revision and updating of the India national formulary; strengthening of quality control, and elimination of irrational drug combinations.

To forsake people's health right in favour of foreign pharmaceutical giants has not a dog's chance when confronted by Arts. 14, 19, 21 and the Directive Principles in Part IV.

It is apt to recall the Supreme Court's observations in *Parmanand Katara*:

> "Art. 21 of the Constitution casts the obligation on the State to preserve life. The provision as explained by this Court in scores of decisions has emphasized and reiterated with gradually increasing emphasis that position".
> [(1989) 4 S.C.C. 286 at Page 293]

In this context we seek emphasis for the point that the right to life includes livelihood and health as explained by B.L. Hansaria (currently Judge of the Supreme Court of India). The learned author states, dealing with Article 21:

> "Right of livelihood is also a part of this article. Now, how can man earn livelihood if he is not healthy? So, the health of a person, more particularly of a worker, would become an integral facet of his right to life. Article 25(2) of the Universal Declaration of Human Rights, 1948 assures that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family ... including medical care, sickness and disability. Article 7(b) of the International Convention on Economic, Social and Cultural Rights, 1966 recognizes the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, safe and healthy working conditions. Article 39(e) of our Constitution enjoins upon the State to direct its policies to secure the health and strength of workers. Relying on these provisions, it was held by Ramaswamy, J. in paragraph 30 of his dissenting judgment in *C.E.S.C. Ltd.* v. *Subhas Chandra*, (1992) 1 S.C.C. 441, that the aim of fundamental rights being to create an egalitarian society and to make liberty available to all, to the tillers of the soil, wage-earners, labourers, wood-cutters, rickshaw-pullers, scavengers and hut-dwellers, the civil and political right to physical and mental health is to be treated as an integral part of the right to life."
> [HANSARIA: Right to Life and Liberty under the Constitution—TRIPATHI Page 34]

Relying on Ramaswamy J. in the above case Sri Hansaria concludes that the right to health is a fundamental right of a workman which includes periodical medical treatment. In *Vincent* Vs. *Union of India* (AIR 1987 S.C. 990) a bench of the Court held:

> "A healthy body is the very foundation for all human activities. That is why the adage "Sariramadyam Khalu Dharma Sadhanam". In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health."
>
> "As pointed out by us, maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society which the Constitution makers envisaged. Attending to public health, in our opinion, therefore, is of high priority—perhaps the one at the top."
> [IBID Page 34-35]

In the light of these observations the jurisprudence of Patents as now carefully delineated by the Indian Patents Act, 1970 cannot be re-wrought to fit into the GATT mould, which is a violent variation violating Art. 21.

Let us remember the sombre realities of Indian life and health. Holistic health strategy pertinent to the Third World traumata, where nutritional deficiencies, medical privations and endemic—epidemic diseases are common, forbids patentisation of foreign pharmaceuticals who may monopolize life-giving drugs and essential medicines and keep prices untouchable and unapproachable for the Indian masses. The sequitur is that lethal liberalization of patent law tuned to TRIPS prescriptions is impermissible.

The WHO estimates that 80 percent of illnesses are preventible. But look at the ghastly Indian situation where 1.5 million children die annually from diarrhoeal diseases caused by polluted water. Half of the world's T.B. patients live in India but we produce only a third of our T.B. drugs requirements. More than 40,000 children in India become blind each year for want of vitamin A; yet vitamin A is in short supply. Over 60 million people in India suffer from endemic goitre only for want of iodised salt. Evidently,

for drug corporate power, with its control board abroad, *profits, not people*, matter. This is bete noire for a Socialist Republic, the Supreme Court having held that the Preamble incorporates the basic features of the Constitution.

WHO estimates that 60 to 80 per cent of the people in the third world have for all practical purposes no access to medical services. What aggravates the agonizing situation is the absence of the right drug at the right time at the right cost and with the right information.

A social audit will record the colossal waste of scarce resources on about 60,000 drug formulations, many of which are hazardous and irrational. The philosophy of "health for all" will remain a grand illusion if the unhappy situation is aggravated by GATTification of patent legislation.

Nothing more harmful to the health of the people can be thought of than opening up Indian pharmaceutical markets to the giants from abroad with their shining publicity masks and sky-rocketing pricing policy. A foreign company sold in India a medicine for Rs. 800 per pill necessary for patients undergoing chemotheraphy. Recently, Indian pharmaceutical firms, by different processes, manufactured and sold the same pill at Rs. 8/- per pill (e.g. ONDANSETRON). The same medicine is sold in France at Rs. 15860 (3172 francs) for 40 tablets. Instances galore can be cited to show the disaster we are inviting by driving Indian pharmaceutical industry into unfair competition and opening the floodgates to foreign pharmaceuticals who, with their brand name baloney, will fleece the common people through dazzling advertisement. It is plain, therefore, that to jettison the Indian Patents Act in obedience to GATT is to hold the health of the common millions to ransom.

Likewise, the humane philosophy, integral to the constitutional compassion underlying Arts. 14, 19 and 21, will be subverted if import from abroad is imperially treated on a par with home-made use of patent. This is a colonial link which deprives India of even the *minimal benefit* of giant foreign firms with Indian patents *working* to make the patented product *within our country*. To treat foreign imports of patented products as Indian-made is a dangerous illusion, abuse of monopoly with the protection of law and

inhibition of industrial initiative in Bharat. This travesty of the patent regime means that Indian law will operate against Indian interests—obviously unreasonable and contrary to Indian people's developmental right. Once we appreciate that under the new GATT regime imports and locally produced goods are the same, the inference is, that such a change is constitutionally obnoxious. For, then patents:

> "would be taken not for establishing production facilities but for establishing import monopoly. The patent-holder will thus have no obligation as such to the national governments which will confer the patent rights on him. There will be no check on the imports of patented products. They will be sold on high transfer price. No price control order would be applicable to them." [FRONTLINE dt. 6-5-94]

This potential renders the TRIPS part of GATT unconstitutional. Another unjust facet of TRIPS may be noticed:

> The term of the patent under the new regime would be 20 years from the date of filing of the application. Since the patent would be available for products or processes, it would be possible, particularly in the chemical base products like drugs and pharmaceuticals, agro-chemicals, alloys and food products, to take patents for new products for 20 years and process patents thereafter for another 20 years."
> [IBID p.14]

Forty years of monopoly is as good as condemnation of Indian inventive prospects for ever! Death sentence on Indian industrial and agricultural advance is the gag impact of this GATTification provision. Let us go further and peek into the future. Changes in the existing excellent Indian patent law are an invitation for regress, not progress. Says Keayla, a person who specialised in this subject, thus:

> "Impact on prices: The main impact would be on the prices of medicines, which would go up several times making it extremely difficult for poor people to afford them. Two specific examples of drugs marketed by the same MNCs in four countries are given to illustrate this point. In India there is process patent at present for medicines, whereas in three other

countries, namely Pakistan, the U.K. and the U.S., there is product patent regime for medicines. It is because of the patent system that the price differential is so high.

Table Price Comparison of Medicines
(Prices converted into Indian Rupees)

Drugs/brand	*Company*	*India*	*Pakistan*	*U.K*	*U.S.A.*
Ranitidine (Zantac) 300 mg × 10s	Glaxo	18.53	260.40	484.42	1050.70
Times Costlier			(14.05)	(26.14)	(56.70)
Diclofenac Sodium (Voveran) 50 mg × 10's	Ciba Geigy	4.95	55.80	96.46	334.95
Times Costlier			(11.27)	(19.49)	(67.67)

Impact on availability: The availability of new drugs/medicines from indigenous sources would be totally reduced. India's dependence on imports would go up, as is the case of Latin American countries, Canada and Italy.

Impact on R&D: The impact on domestic research and development activity in India would be tremendous. Owing to paucity of funds, particularly in the drugs and pharmaceuticals field, research both in the public and the private sectors has been mainly concentrated on process technologies. The research efforts would be severely affected as there would be no takers for process technologies in the new patent regime. For basic research, India does not have the funds or the infrastructure to match the MNCs.

Impact on SSI sector: The existing industry, particularly in the small-scale sector where there are about 18,000 registered units, would, over a period of a decade or so after the introduction of the new regime, face serious 'degrowth' and many units will have to close down. This will effect the availability of drugs and pharmaceuticals, agro-chemicals and so on from indigenous sources, and result in large-scale unemployment."
[IBID p. 15]

The noxious social consequences in the pharmaceutical field are more. Keayla puts his points antithetically and sharply to bring out what appears to us quite succinct, sound and justified:

"*Myth:* The Government says we have a 10 year transitional period for the introduction of product patent in drugs.

Reality: Patent laws will have to be changed in three stages: (a) Phase I during 1994-95: the Patents Act will have to be revised to provide for the acceptance of product patent applications in the area of pharmaceuticals and agro-chemicals. India has also to provide exclusive marketing rights and right of priority to such applicants from 1995 onwards; (b) Phase II by July 2000: changes will have to be made for applying the criteria of the TRIPS Agreement to the patent system in all fields except changes of Phase III. (c) Phase III: changes will be made in 2000 itself to apply product patent rights from 2005 in the areas of technology which are not so protectable at present in India."

"*Myth:* The Government says only 10 to 15 per cent of India's turnover would be affected by the product patent system.

Reality: The scope of patentability is given in Article 27, and that of exclusive rights in Article 28 of the TRIPS Agreement. The scope of patentability has been enlarged to a considerable extent. The new patent regime will mean product patent right for 20 years and process patent right for 20 years. Patent rights on new combinations, new dosage forms, new usage forms, and so on would also be applicable. In the U.S., 85 to 90 per cent turnover of pharmaceuticals is covered by some sort of patent system. Similarly, in India also the scope of patent protection would get extended to 70 to 80 per cent of the country's turnover."

"*Myth:* The Government says the prices of medicines would go up by not more than 30 to 40 per cent.

Reality: When there is an absolute product patent monopoly, prices would go up several times as is the situation in Pakistan where there is product patent instead of process patent. The prices in Pakistan are several times higher than in India. When the global monopoly is introduced through a new patent regime, prices would go up still higher. In India the prices are bound to rise by five to 10 times, if not more, for new products. The existing products would also be influenced by the new process patent,

usage form, dosage form and combination form of regimes and as such their prices would also go up by three to five times the present prices."

"*Myth:* The Government says compulsory licence/licensing of right system would be applied under the new patent regime.

Reality: Authorisation under Article 31 has a very limited scope. It is for research, educational and non-commercial purposes, and under circumstances of extreme urgency or when there is a national emergency. This authorisation has also to be terminated when the circumstances which led to the authorisation cease to exist and are unlikely to recur. For such authorisation, adequate remuneration will have to be given to right-holders.

For commercial purposes there is no provision for authorisation. India will have to depend only upon imports.

Thus, the new regime would be even stiffer than the U.S. patent regime and under no circumstances it is going to help India in any way. India will get neither technology nor investment because the patent-holder would be able to exploit Indian markets by transferring goods, as imports have been given the same patent right as the domestic production."

The Commerce Minister Sri Chidambaran, usually U.S. friendly, had once stated that if Dunkel terms were to prevail, prices of medicines would shoot up ten times. A Consumer Rights' activist, Ralph Nader, has generalised his condemnation of the GATT process:

> "An unprecedented corporate power grab is underway within the Uruguay Round negotiations of a new version of the General Agreement on Tariffs and Trade, the treaty which governs most of the world's trade. By clever manipulation of free trade symbols and dependency between nations, multinational corportions hope to harmonize downwards: consumer protection, environmental and worker safety standards and wage levels. Special burdens are in store for Third World countries, whose sovereignty the multinational companies are hoping to further erode."

That apart, a leading U.S. Congressman is reported to have said about American pharmaceuticals:

> "Without adequate explanation, one can only conclude that what is going on in this (the pharmaceuticals) industry is greed on a massive scale. This is an industry that insists on increasing its profits at the expense of the sick, the poor and the elderly."

So the time has come for the people of India to awaken to the danger of TRIPS.

PATENTS (AMENDMENT) BILL, 1995

The Government of India promulgated an Ordinance on December 31, 1994 to amend the Patents Act, 1970. Later in the budget session of Parliament, the Government introduced the Patents (Amendment) Bill, 1995 to replace the Ordinance.

The Bill was passed in Lok Sabha (Lower House) with a thin majority—146 votes in favour and 132 against. The Bill, however, could not be introduced by Government in Rajya Sabha (Upper House) as the Government was not sure about the passing of the bill in that House. The Government has since succeeded in referring the Bill to a Select Committee of Rajya Sabha (Upper House) after there was agreement on the members of the Committee. The Patents (Amendment) Bill, 1995 is reproduced at **Annexure-4**.

The analysis of the bill would indicate that the proposed amendments are neither in the interest of the country nor are they in consonance with the provisions of the TRIPs Agreement. In the Preamble itself, it is stated that the Patents Act is being amended "for the purpose of reduction of distortions and impediments to international trade and promotion of effective and adequate protection of intellectual property rights". There is nothing to show that the Indian Patents Act, 1970 ever created distortions and impediments to international trade. Also, the effectiveness and adequacy of the protection of intellectual property rights provided in that Act was repeatedly vouchsafed by this Government in its statements in the Parliament, in the international fora and public at large. And yet the preamble blithely takes a diametrically opposite position. It is not difficult to see what has

led to this sudden and abject self-condemnation. This amounts to a service repetition of the false propagandist proposition put forward by the TNCs dominating the industry globally.

The TRIPs Agreement in Art. 70.9 provides for grant of exclusive marketing right whereas the Patents (Amendment) Bill has provided for exclusive right to "sell or distribute". Exclusive right for distribution is not tenable under the MRTP Act. It is, therefore, not clear why the Government provided for exclusive right to sell or distribute instead of exclusive marketing right as provided in the TRIPs Agreement.

It is contemplated in the Patents (Amendment) Bill that the applications received for product patents would not be referred for examination by the examiner for making a report till 31st day of December 2004. As regards the application for grant of exclusive marketing right, the scope of examination by the patent examiner is extremely limited. Exclusive marketing rights have to be given, as per the transitional arrangements in TRIPs Agreement in all such cases where the applicant claims to have obtained a patent and marketing approval in any WTO member country. There are several problems with this system of granting exclusive marketing rights. In the first place, it is objectionable to keep the patent application unattended. It would be in the fitness of things if the patent application is examined as per the provisions of Chapter IV of the Patents Act. Similarly, the exclusive marketing right application should also be examined as per the provisions of Chapter IV. It is important to examine whether the subject matter of the application for patent/exclusive marketing right is not in public domain. The subject matter of the invention should also be new, involve an inventive step and should be capable of industrial application to qualify for patent/exclusive marketing right.

The new Section 24B as provided in the Patents (Amendment) Bill, 1995 mentions about "an application for the same invention claiming identical article or substance in a convention country". In this regard, Government in their Notification No. S.O. 7(E) dated January 3, 1995 has declared 72 countries as convention countries. The inclusion of these countries in the list of convention countries seems to have been done without examining the patent

grant system or the procedure for approval of new drugs and agro-chemicals in all these countries. Thus this aspect is certainly not in the national interest. It would be relevant to provide instead for patents and exclusive marketing right obtained in the country of invention on a product prior to the claim made under new sub-section (2) of Section 5 of the Patents (Amendment) Bill. It would also be relevant to know the status of applications filed in other Member countries and the reasons if such an application has been rejected in any other country.

The new Section 24B(1)(b) further provides for exclusive marketing right for a product manufactured through a particular process. Process patents are already granted in India under the Patents Act, 1970 and therefore the question of grant of exclusive marketing right on such products should not arise. Moreover, exclusive marketing rights can be granted only on a particular process and not for the product manufactured through that process. The new Section 24B(2) provides for exclusive rights for products already in public domain. No obligation to restore protection to subject matter which has already fallen in public domain has been specifically provided in Art. 70.3 and as such it would not be relevant to provide for exclusive marketing rights as provided in the amending bill for such products.

New Section 24C provides that the "working of the invention shall be deemed to be selling or distributing of the article or substance". The working of an invention has all along been treated as 'manufacturing' and as such the new definition of "working" is totally contrary to the patent system and should be changed to manufacturing as working. Similarly, special provision for selling or distribution in new Section 24D is also not relevant and the Government should provide for exclusive right for manufacturing also in case the exclusive-right holder does not serve the market adequately and charges high prices. Without this change in provision, the public interest would not be served.

Bearing in mind that an exclusive right is a monopoly, it must be made clear in the legislation that any grant for an exclusive right would not be exempt from the Monopolies and Restrictive Trade Practices Act, 1969. Such a special provision would have to be made in the light of Section 37 of the MRTPA 1969.

Considering the various aspects mentioned above, the Patents (Amendment) Bill would only serve the interests of the multinational companies who would be registering large number of patents. It would not be desirable to amend the Patents Act which would hurt the interests of the consumers and domestic industries as also future growth of research and development in the Country. The kind of exclusive marketing rights proposed in the amending bill by our Government are so liberal that even US, UK, Japan etc. would not provide in their laws. Argentina, Brazil etc. have also not provided for such laws for exclusive marketing rights in their patent laws so far.

II

Agreement on Agriculture

The Agreement seeks binding commitments from member countries in several broad areas. These include: (i) discipline in the subsidies regime, (ii) enhanced market access through increased tariffication of NTBs and establishment of minimum access opportunities for imports where imports were below 3 per cent as between 1986 and 1988, (iii) discipline on public stockholding of grains for food security, (iv) adoption of health and safety regulations in accordance with the established international standards, and (v) strengthening of intellectual property protection, including introduction of intellectual property rights in agriculture.

The Agreement on Agriculture while pushing for liberalization of agricultural policies also recognizes the possibilities of adverse implications on developing and the least-developed countries. The latter have particularly been granted exemptions from fulfilling several commitments under the Agreement. In addition, the Uruguay Round Agreement has made provisions to establish instruments to decrease the possible negative effects of trade

liberalization on the least-developed and the net-food importing developing countries.

In the following discussion we would deal with the above mentioned aspects of the Agreement.

THE SUBSIDY DISCIPLINE: DOMESTIC SUPPORT COMMITMENTS

The objective of the Uruguay Round negotiations of reducing the market distortions in agriculture has taken the form of a detailed specification of the type of regime that can be maintained for granting subsidies.

The initial position of the US was that subsidies should be eliminated completely over a ten-year period (the so-called zero-option). This position, it has been indicated, was an unrealistic position since the US was itself increasing its protection to domestic agriculture in the phase immediately preceding the Uruguay Round negotiations (a point we shall elaborate later). After the protracted negotiations during which the US came closer to its own reality of farm support policies, significantly less reduction of subsidies was agreed to.

The subsidy-discipline is sought to be introduced by setting binding commitments on countries as regards the support they can provide to their agricultural sector. According to the Agreement, the basis for calculation of subsidies is the Aggregate Measurement of Support (AMS), which is to be calculated for each product receiving market price support, non-exempt direct payments, or any other subsidy not exempt from the reduction commitment. All other non-product specific support is to be put together into one non-product specific AMS. The Agreement further provides that the AMS would have to include not only budgetary outlays, but also revenue foregone by the Government and its agents. Additionally, the subsidy-discipline stipulates that support provided to agriculture both at national and sub-national levels have to be taken into account. This last mentioned proviso is ostensibly aimed at including price support granted by federal governments in some countries.

At the same time, however, the Uruguay Round Agreement stipulates that several categories of subsidies would be exempt from AMS calculations. These include domestic support policies that have, at most, a minimal impact on trade (so-called "green box" policies which first appeared in the Draft Final Act of 1991). Two classes of support can be seen as qualifying for exemption as per the Agreement: (i) government support for several specific service programmes, and (ii) direct income support to producers. Included in the first category are government support for research programmes, pest and disease control, training services, extension and advisory services, inspection services, marketing and promotion services and infrastructural services of various kinds. Budgetary allocations for all these forms of agricultural support would not have to be included in the AMS. In a similar vein, payments to farmers under environmental programmes or to producers in disadvantaged regions would also qualify for exclusion according to the provisions of the Agreement. However, the criteria for identifying such regions would have to be vetted by the WTO.

In the second category, two forms of income support would qualify for exemption: (i) payments under production-limiting programmes, including direct payment and,(ii) de-coupled income support. Support for production-limiting programmes has been exempted from being treated under AMS to encourage countries to produce less and avoid creating conditions of glut in the market. This provision was included to address one of the main concerns, that found expression in the negotiating mandate of the Uruguay Round, viz. the instability in agricultural prices arising out of over-production.

In addition to the "green box" policies, the other policy that would not be regarded as a part of the total AMS, but which forms a part of the support package that developed countries offer, is the direct payment to producers under production-limiting programmes.

Production-limiting support that can be exempted from being treated as subsidies have to be payments made on 85 per cent or less of the base level production, the base years being defined as between 1986 and 1988. Thus, production levels have to be fixed at 85 per cent or less than those in the base years in order to secure the exemptions that the Agreement provides for.

Also exempt from the calculation of the AMS are two other measures aimed at reducing the marketable surplus of agricultural products. Programmes for the retirement of producers as well as resources employed in the past to produce marketable surplus can be supported without being affected by the subsidy discipline.

The most important exclusion allowed is the income-decoupled support. This is the principal form of support that the US farmers enjoy. Further, the proposed CAP reform of the EU also entails adoption of a similar mechanism for providing support to the European farmers.

The reduction commitments of AMS that countries have had to take have varied across countries. According to the rules that have been laid out, a certain level of subsidisation will not attract the developed countries discipline. They have been allowed a 5 per cent ceiling on the level of subsidies they can provide. Developing countries have a higher ceiling of 10 per cent. This is supposed to be in keeping with the special and differential treatment that these countries enjoy in the trading regime governed by the GATT. The percentages relate to the value of output.

The quantitative discipline governing the reduction in the prevalent levels of domestic support will be reflected in the schedules of commitment annexed to the agreement.

As regards export subsidies, developing countries will be exempt from the discipline. The developed countries will be required to reduce the level of their export subsidisation. The qualitative targets are so prescribed that even at the end of the six year period from the date of entry into force of the agreement the developed countries will still be within that right to maintain budgeting outlays for export subsidies and the quantities benefiting from such subsidies at a level as high as 64% and 79% of the 1984-1990 base period levels respectively.

MARKET ACCESS

Two mechanisms for committing countries to provide better market access opportunities have been identified. The first involves tariffication of NTBs (non-tariff barriers) and reduction of existing

levels of tariff protection. The average reduction of tariffs after tariffication of NTBs would have to be 36 per cent for developed countries and 24 per cent for developing countries. Developed countries would have a period of 6 years within which to decrease their tariff levels, while developing countries would have ten years to implement tariff cuts. Least-developed countries, on the other hand, would not have to undertake any commitment to reduce their tariff levels. The second is the establishment of minimum access opportunities for imports of primary agricultural products in case a country had imported less than 3 per cent of domestic consumption of such products as between 1986 and 1988.

The proposed tariffication of NTBs and reduction of levels of tariff already existing in countries is in keeping with the overall framework of the negotiations which aim at, (i) increased transparency in imposition of trade restrictions, and (ii) progressive reduction in the tariff levels. It is further provided that NTBs, once tariffied, cannot be reintroduced.

The minimum access opportunities for imports of primary commodities would have to be established if countries avail themselves of the "special treatment" clause. This clause, contained in Annex 5 of the Agreement on Agriculture, provides that if the imports of primary agricultural product and their worked and/or prepared products were less than three per cent of domestic consumption, minimum access opportunities of specified orders would have to be provided.

This provision thus seeks to impose the condition of minimum import of primary agricultural commodities on countries even if they do not require to import at all or need to import only small quantities when the new GATT Agreement comes into effect. This is an area where the rules of free trade enshrined in the Uruguay Round Agreement have been given up completely. Instead of using market prices as guide-posts, the level of imports are sought to be influenced by compulsory import quotas.

The Final Act provides that once the new agreement comes into operation, countries will have to provide access opportunities to imports of at least 4 per cent of their total consumption as between 1986 and 1988, except for a primary commodity which is considered as staple in the traditional diet of a developing

country. In this latter case, the minimum access opportunity would have to be one per cent of the corresponding domestic consumption to begin with. The access opportunities would have to be increased annually by 0.8 per cent for the non-staple commodities upto the sixth years, implying thereby that the minimum access opportunity would have to be 8 per cent. In case of the commodity which is the staple, the minimum access opportunity would have to be increased at the beginning of the fifth year of the implementation period to two per cent of the domestic consumption between 1986 and 1988 and further to 4 per cent at the beginning of the tenth year after the enforcement of the agreement. Lower levels of annual increments in access opportunities would be allowed in case a country ceases to avail of the special treatment provided in Annex 5 of the Agreement.

Countries are exempt to provide minimum access opportunity so long they have BOP (balance of payment) problem. Insofar as India is concerned, BOP problem will soon come up for review by the BOP Committee for WTO. In view of large foreign exchange reserves available, India may not qualify for exemption from BOP and will soon face all problems from minimum market access.

DISCIPLINE ON PUBLIC STOCKHOLDING OF GRAINS FOR FOOD SECURITY

Public stockholding of grains for food security would be subject to GATT discipline in the proposed trading regime. This measure is consistent with the GATT principle of reducing the scope of interventions in the market. In doing so, the issue of food subsidy has also been brought under the purview WTO.

According to the Agreement, developing countries would be allowed to use public stockholding of grains for food security purposes "provided that the difference between the acquisition price and the external reference price (i.e. the ruling international price) is accounted for in the AMS". This raises several crucial questions for countries like India where the acquisition price for building food stocks is lower than the international prices.

A further provision that is included in the context of using

public stockholding for food security purposes is that the beneficiaries would have to be targeted. Countries have been given the liberty to give food aid to the poor, but the poor would have to be identified on the basis of "clearly-defined criteria related to nutritional objectives". This proviso implies that the criteria adopted for identifying the poor must have the approval of the WTO and that the eventual decision as to who should receive food aid would be made *de facto* by the multilateral organization.

IMPACT OF AGRICULTURE AGREEMENT ON INDIA

The requirement under the Agriculture Agreement to reduce domestic support by the levels specified in the Schedule of Commitments will prevent the Indian government from providing the necessary product-specific and general support to farmers to compensate for shortages or overabundance caused by climatic variation or fluctuations in market prices due to other factors. This loss of support will reduce the ability of farmers to produce an adequate supply of food at reasonable prices thereby affecting the right to food.

However, the rich industrialized countries will continue to subsidize farmers by giving them the direct payments which are exempt from any reduction requirements and which essentially are cash handouts contingent on making adjustments in production. These payments not to produce are neither affordable nor helpful in a developing country. The result will be that the industrialized countries will continue to dominate world trade in agriculture while preventing India from being self-sufficient in food production.

The domestic support provisions will adversely affect India's domestic food security and food aid programmes. The Agriculture Agreement exempts governmental expenditures relating to public stockholding for food security purposes from reduction requirements if the operation of such programmes is transparent and follows officially published objective criteria. This automatically subjects these programmes to external scrutiny. A developing country may acquire and release foodstuffs at administered prices,

however, the difference between the international market price and the administered price will be included in the calculation of the AMS (Annex 2, para 3, footnote 5). Therefore, the public stockholding system will be subject to reduction requirements if the AMS exceeds the 10 per cent de minimus level.

The Agreement also exempts expenditures in relation to provision of domestic food aid from the reduction requirements as long as eligibility for food aid is subject to clearly defined criteria relating to nutritional objectives. Food purchases by the government must be made at current market prices, however, food may be provided at subsidized prices with the objective of meeting the food requirements of the urban and rural poor in developing countries at reasonable prices (Annex 2, para 4, footnote 6). This provision is meant to ensure that India can continue the Public Distribution System of Foodgrains (PDS) which requires heavy subsidization of food prices. However, while subsidization of the Food Corporation of India would be allowed, the provision does not allow the government to purchase food from farmers at other than market prices. Therefore, while purportedly allowing the PDS system to continue, the Agreement hinders its functioning by subjecting it to external scrutiny, imposing criteria relating to nutritional objectives and preventing the government to purchase food from farmers at higher or lower than the market price.

The export commitment requirements, in turn, prevent India from providing subsidies to industry that are necessary for it to expand its share of world export markets. This limitation will adversely affect the future of Indian agriculture.

An important provision (Article XX) provides for continuation of the so-called Reform Process. One year before the end of the implementation period i.e. in the beginning of the year 2000 AD negotiations will commence to take stock of implementation and more importantly to see what further commitments are necessary to achieve the long-term objective of substantial progressive reductions in support and protection levels. It is obvious that whatever escape route has been obtained in regard to removal of quantitative restrictions and provision of minimum market access opportunities on the ground of balance of payment difficulties

will come in for rigorous scrutiny in these negotiations and we shall no longer be able to plead for continued enjoyment of exemptions on these grounds. In other words, Indian agriculture will be subjected to full rigours of integration with the world agricultural production and trade in the near future. The serious adverse impact of such integration in term of higher prices for essential commodities such as wheat and sugar, particularly on poorer sections of population can easily be imagined. Also, the possibility of shift away from food crops to commercial crops fetching higher international prices resulting in food shortages cannot also be lightly dismissed.

In connection with the market share reserved for imports it would be worthwhile to refer to the annual report 1993-94 published by Department of Agriculture and Co-operation. Simultaneously, it will be necessary also to refer to a paper by Ministry of Commerce entitled 'Implication for India of the Dunkel Proposal on Trade in Agriculture'. A close reading of the first would show that during the period 1988-89 to 1992-93, agriculture exports registered a growth of 181% as compared to the growth of 161% in the non-agricultural exports. An important characteristic of agricultural exports is its low import intensity. The export of non-traditional items, namely, raw cotton, oil meals, marine products, basmati rice and cashew during the period April-August, 1993 registered a remarkable increase over that in the corresponding period of the previous year as reported in the Department of Agriculture & Co-operation Annual Report 1993-94. It is in the context of this situation that one has to evaluate and appreciate the compulsion to permit import of food grains to the extent mentioned hereinbefore under the clause 'Market Access Support' and to facilitate the same by reducing the custom duties and non-tarrif import barriers. The un-understandable part of the situation is even if you do not need a particular commodity, say agricultural products in this case, yet as a signatory to GATT, the country will have to allow import of agriculture commodities, and that too, by suffering loss in custom duties.

It is said that one can seek exemption from these clauses on the basis that India has a balance of payments—problem. This escape route has a number of road blocks in it. Balance of payment

consideration can only be invoked to exclude non-tariff barriers from conversion into tariff equivalents through the processes of tariffication. However, ordinary custom duties will still have to be reduced by 36 to 24% by developing countries. The minimum market share of 3.5% of the domestic consumption, or 3.3% if a developing country, must be provided.

The Agreement on Agriculture requires countries to provide minimum access opportunities for imports of primary agriculture commodities. For a developing country, the minimum access opportunity would have to be one per cent of domestic consumption as between 1986 and 1988 for the principal staple food of the country concerned in the initial year. The minimum access opportunity would have to increase to 2 per cent of domestic consumption for the same base year at the beginning of the fifth year and to 4 per cent at the beginning of the tenth year of the implementation of the WTO Agreement. For all other primary commodities, the minimum access opportunities to be established would have to be 4 per cent of domestic consumption between 1986 and 1988 at the commencement of implementation of the Agreement which would have to increase to 8 per cent at the beginning of the fifth year.

The reduction of custom duties and non-tariff barriers as well as the guaranteed minimum market share for imports will adversely affect Indian farmers by forcing them to compete against the large transnational Corporations which have excessive financial power resulting from their oligopolistic control over world food markets. For example, six conglomerates—Cargill, Continental Grain, Louis Dreyfus, Bunge and Born, Mistui/Cook and Andre-Garnac controls 85% of world trade in grain including wheat, corn, oats, and sorghum. Similarly, eight transnational corporations control 60% of world sales of coffee, five corporations control 90% of world tea sales; three companies control 75% of the global banana market; five corporations account for 75% of trade in Cocoa; six leaf buyers control 90% of the world trade in leaf tobacco; and fifteen companies control 90% of globally traded cotton. Indian farmers cannot fairly compete against the enormous financial and technological boom of the transnational giants of the rich countries, particularly when custom duties and other import barriers are reduced, and these

companies are guaranteed a share of the Indian market. Compliance with market access requirements will devastate domestic food production and India will become wholly dependent on foreign food grains. As a result, Indian citizens will be deprived of their fundamental right to food.

In the matter of seeds, it is to be remembered that seed is the basic, crucial and vital input for attaining the sustained growth in agricultural production. Thus, the seed lies at the root of our planning for prosperity. In view of its importance, an emphasis has been laid on the production and distribution of quality seeds from the very First Five Year Plan. The Seeds Act of 1966 was enacted followed by the Seeds Rules, 1968. Under these legislations, Seed Review Team, and National Commission on Agriculture have been set up. A new seed policy was enunciated in 1980, setting up the State Seed Corporation in various States of our country. The National Seeds Project was launched with the assistance of the World Bank to ensure the production and distribution of seeds to the farmers in time and at reasonable prices. This has vitalized the seed sector. Now under the Agreement Uruguay Round, the seeds have to be patented, an aspect which will be examined under TRIPS. In India, ordinarily a farmer sets apart seeds for the next year from the harvest collected in the current year. Can he enjoy benefit of patented seeds? And it must be remembered that the patent can be obtained in any country which may be a party to this multilateral Agreement. This is going to create a serious impediment to the farmers in our country.

AGREEMENT ON SANITARY AND PHYTO-SANITARY MEASURES

The Uruguay Round Agreement sets forth rules regarding adoption of sanitary or phyto-sanitary standards which are measures that protect animal, plant or human life or health from risk arising from pests and disease as well as additives, contaminants, loxic or disease causing organisms for foods, beverages or feed stuffs.

The Agreement expressly allows countries to adopt the measures

necessary to protect human, animal or plant life or health as long as such measures do not constitute a disguised restriction on international trade. Members have the right to take recourse sanitary and phyto-sanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of the Agreement. Members have to ensure that all sanitary and phyto-sanitary measures are applied only to the extent necessary to protect human, animal or plant life or health and must be based on scientific principles and are not maintained without sufficient scientific evidence except as provided in paragraph 22. Requirement specified in this behalf will prevent countries from adopting adequate sanitary measures because of defect of showing what precautions are precisely necessary to protect health. The level of scientific precision needed to determine what is necessary to protect health is often not readily available; consequently it is often necessary to adopt measures which provide a certain amount of over protection. This will, however, expose the regulation to a challenge as a trade barrier. And the requirement that a standard should not be maintained against available scientific evidence will further discourage promulgation of adequate sanitary precautions because there is always some scientific evidence which can be invoked to show that a particular safety precaution need not be taken. These requirements that sanitary measures be necessary and not contradict available scientific evidence will discourage promulgation of adequate food safety standards, which, in turn, adversely affects the right to food.

The Agreement requires a country to base its risk assessment techniques as well as sanitary or phyto-sanitary measures on international standards, guidelines or recommendations. The standards established by Codex Alimentarius Commission (Codex) relating to food addities, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice are international standards applicable to food safety. The standards developed under the auspices of the International Office of Epizootics are the international standard governing animal health. The standards developed under the International Plant Protection Convention are the international standards applicable to plant health.

Under the Agreement, the sanitary and phyto-sanitary measures which conform to international standards are deemed to be necessary to protect the human, animal or plant life or health and are presumed to be consistent with the Dunkel Draft. A country may adopt sanitary or phyto-sanitary measures which are more stringent than international standards only if there is a scientific justification as long as standards do not constitute a disguised restriction on international trade.

The presumption underlying the Uruguay Round Agreement is that if a nation conforms its food safety laws to international standards, such measures are valid. This presumption shifts the burden of proof to a country which maintains sanitary measures that are more stringent than international standards to show that such standard does not distort trade. The country has further to show that there was a scientific justification for adopting higher standard. This presumption in favour of international standards may jeopardize health and safety because the international standards applied by GATT are weaker than the health, sanitary and environmental loss of most countries.

To sum up, the provisions of the Agreement prevent adoption of adequate food safety laws by (1) requiring that sanitary and phyto-sanitary measures be necessary to human health and not maintained against available scientific evidence despite the general lack of scientific certainty and uniformity with respect to health matters; (2) Subordinating the interest in health and safety to the interest in unrestrained trade and economic cost of compliance with negotiations; and (3) requiring India to conform its laws in food safety, health and environment to weak international standards such as those promulgated by Codex. In sum, the relevant rules operate to prevent adoption of sufficient food safety and health loss which deprive the Indian people of a right to food.

Briefly, these aspects would show how India which was once food importing country, and now in a position to export food, would be handicapped in pursuing its goals of becoming a food exporting country. These are the broad features of adverse impact of the Uruguay Round Agreement on Agriculture which may be examined with other aspects of the matter.

III

Agreement on Trade-Related Investment Measures (TRIMS)

The Agreement on Trade-Related Investment Measures (TRIMS) requires removal of investment measures relating to trade in good which are inconsistent with two provisions of GATT, 1947: (1) the Article III requirement of national treatment, and (2) the Article XI prohibition on quantitative restrictions.

NATIONAL TREATMENT

Under GATT, "national treatment" meant that internal laws and regulations could not be applied so as to afford protection to domestic production or to disadvantage imports.[15] Instead, the same treatment had to be accorded to domestic products and imports. However, national treatment did not forbid payment of subsidies exclusively to domestic producers and did not apply to government procurement.

Under the TRIMS Agreement, investment regulations may not be applied so as to advantage domestic production over imports. The illustrative examples of prohibited TRIMS are (1) requiring that an enterprise use locally produced inputs in production; and (2) limiting an enterprise's purchase of imports to an amount related to the value of local production it exports. The first "TRIM" favors domestic production while the second TRIM disadvantages imports. The TRIMS Agreement essentially forbids placing restrictions on the operations of an enterprise which has the result of protecting domestic products and disadvantaging imports.

However, subsidies applicable solely to domestic enterprise

15 GATT, Art. III.

and government procurement in favor of domestic producers will not violate the TRIMS Agreement.[16]

QUANTITATIVE RESTRICTIONS

The GATT required removal of quantitative restrictions namely, quotas and import licenses on imports and exports.[17] However, exceptions were allowed if a country was suffering from balance of payments problems.

The TRIMS Agreement prohibits investment regulations that have the effect of imposing quantitative restrictions on imports. The illustrative examples of prohibited TRIMS are: (1) restricting an enterprise's ability to import to an amount related to the volume or value of local production it exports; (2) restricting an enterprise's ability to import by restricting its access to foreign exchange to an amount related to the foreign exchange earned by the enterprise; (3) restricting the exports by an enterprise in terms of the volume or value of its local production. In essence, the TRIMS Agreement forbids imposing restrictions on an enterprise which have the effect of limiting the volume of imports or exports by that enterprise.

These two requirements, national treatment and no quantitative restrictions, effectively allow full freedom of action for foreign companies investing in India. They can be assured of competing on the same terms and conditions as Indian companies. They are also assured of complete free access to their parent companies so as to be able to import and export items from their affiliated companies without any restrictions.

TRANSITION PERIOD

The industrialized countries are required to eliminate TRIMS by July 1, 1997. Developing countries are required to do so by the

16 TRIMS Agreement, Art. 3
17 GATT, Art. XI(1).

year 2000 and least developed countries are required to eliminate TRIMS by 2002. (Article 5.2)

IMPACT OF TRIMS AGREEMENT ON INDIA

1. In essence, the TRIMS Agreement ensures that affiliates of foreign companies would compete on the same basis as domestic Indian companies and have unrestricted access to the goods and other supplies from this parent companies abroad. This means that India will no longer have the power to prevent multinationals from merely extracting resources from India and dumping imported goods in the domestic market by requiring them to use locally produced goods as production inputs or limiting imports of an enterprise to an amount related to its exports. The result will be to make India an import dependent economy because foreign investment has historically increased imports and reduced exports.

2. Two studies conducted by the Reserve Bank of India revealed that, in 1960-61 to 1966-67, the value of exports by the affiliates of foreign companies operating in India rose from only Rs. 25.4 crores to Rs. 36.8 crores while their merchandise imports increased from Rs. 98.7 crores to Rs. 121.8 crores. A 1981 study by the Indian Institute of Foreign Trade compared export/sales ratios of 28 foreign affiliates and 18 local firms in six different industries and concluded that the greater the share of foreign ownership the higher the import intensity and the lower the export intensity. The study found that the foreign affiliates did not contribute significantly to total exports of manufactures from India, especially the technology intensive items.

3. The TRIMS agreement provides an illustrative list of measures which are not permissible. The categories listed are quite comprehensive. All practices that we have been adopting to facilitate indigenisation or exports will come under the prohibited category. The phased manufacturing programme, the export obligations, the correspondence of import entitlements to export earnings, the prohibition of import of certain raw materials or components—all such measures will no longer be permissible.

The existing measures will have to be notified to the designated international authority and phased out in a period of five years in the case of developing countries. The only circumstance under which deviation from the discipline is possible is under the difficult balance of payment situation and such deviation will be admittedly only temporary.

What is significant is that the agreement explicitly lays down that the operation of this discipline shall be reviewed not later than five years of the date of entry into force of the agreement. Furthermore, such a review may also consider complementing the discipline by provisions on investment policy and competition policy. Thus a full scale intrusion into the domestic area of investment policy has already been identified for further negotiations.

IV

General Agreement on Trade in Services (GATS)

The General Agreement on Trade in Services (GATS) is primarily an enabling agreement which creates a legal framework for trade in services but allows countries to specify the actual commitments to be undertaken in the Schedule of Commitments. The GATS must be read with other documents contained in the Ministerial Declarations and Decisions section of the Final Act, most importantly, the Understanding on Commitments in Financial Services as discussed below.

The GATS is divided into three major parts: (1) general obligations; (2) specific commitments; and (3) commitments relating to specific sectors, namely, financial services (banking and insurance), telecommunications, air transport and movement of labor.

GENERAL OBLIGATIONS

GATS requires countries to provide most-favoured nation treatment which means that equally favourable treatment accorded to service suppliers of one country must be extended to service suppliers of another country (Article II). Exemptions may be made to the MFN requirement provided it is for a period less than ten years. The exemptions will be reviewed by the Council on Trade in Services in the year 2000 (Article II, Annex on Article II exemptions). GATS allows countries to enter into agreements resulting in integration of service markets as long as that agreement has substantial sector coverage and provides for elimination of substantially all discrimination between the parties in the covered sectors (Article V).

GATS requires a country to make laws and rules governing the service sector in a transparent fashion (Article III). GATS requires countries to adopt domestic regulations that are based on objective and transparent criteria such as competence to supply the services, are not more burdensome than to ensure the quality of the service and are not a restriction on the supply of the service (Article VI). Countries may adopt criteria for recognition of the education or experience obtained in another country as long as such recognition does not operate as a means of discrimination between countries (Article VII).

GATS requires a country to ensure that a service supplier with a monopolist's position in its country does not abuse its powers to act in a manner inconsistent with that country's commitments (Article VIII). GATS recognizes that business practices of service suppliers may restrain competition and requires members to enter into consultations to eliminate such practices upon the request of another member (Article IX).

GATS allows countries exemptions from their scheduled commitments for balance of payments reasons (Article XII). Additional exemptions are provided so as to enable a member to protect its national security and for purposes of protecting public order, human, animal or plant life or health, prevention of fraudulent and deceptive practices and protection of privacy.

SPECIFIC COMMITMENTS

National Treatment

A country must provide national treatment with respect to the service sectors inscribed in its schedule. This means that a country must accord foreign service suppliers the same treatment as domestic service suppliers (Article XVII).

Market Access

If a country has undertaken market access commitments in its Schedule, it may not impose limitations on the number of service suppliers, the total value of service transactions, the total number of service operations, the number of natural persons that may be employed in a service sector, limitations on the type of legal entity or joint venture through which a service may be supplied or limitations on the participation of foreign capital (Article XVI). It is important to note that, if India agrees to market access concessions, it cannot limit foreign equity participation in the sectors specified.

SPECIFIC SECTOR-WISE COMMITMENTS

Financial Services

The Annex on Financial Services in GATS is concerned primarily with defining financial services. The actual commitments are set forth in the Understanding on Commitments on Financial Services and these commitments are inscribed in a country's Schedule of Commitments.

Financial services include a wide range of banking services as well as insurance but do not apply to activities of a central bank or monetary authority or other activities of a public entity using the financial resources of the Government (Annex on Financial Services, Para 1).

Financial services include both life and non-life insurance, reinsurance and ancillary services such as brokering, actuarial, risk assessment and claims handling services. The banking services,

in turn, include traditional services such as acceptance of deposits, lending of all types, money transmission services such as credit cards, travellers checks and bankers drafts, guarantees. Banking services further include trading on a bank's own account or on account of customers either on an exchange or over-the-counter of the following instruments: money market instruments, exchange rate and interest rate swaps and forward rate agreements, securities, futures and options. It also includes underwriting, placement and issuance of securities, asset management, providing settlement and clearing services for financial assets, transfer of financial information and financial data processing as well as other auxiliary financial services. In other words, financial services include a wide range of traditional banking, trading and investment activities (Annex on Financial Services, Para 5).

The Understanding on Commitments in Financial Services ("Understanding") imposes the following requirements on financial services:

MONOPOLY RIGHTS

Countries must eliminate monopoly rights of financial service suppliers listed in its Schedule. This includes services provided by a public entity using the financial resources of the government (Understanding, Para 1).

GOVERNMENT PROCUREMENT

A Government must not discriminate between domestic and foreign suppliers of financial services when making purchases for its own use. Furthermore, all financial suppliers should be accorded equally favorable treatment (Understanding, Para 2).

CROSS-BORDER TRADE

A country must allow its residents to purchase certain financial services in the territory of another country. These financial services

include all the banking services discussed above and insurance services relating to maritime shipping, commercial aviation, space launching and satellites, goods in international transit and reinsurance services.

COMMERCIAL PRESENCE

Each country must allow financial service suppliers the right to establish or expand its commercial presence within its territory.

TEMPORARY ENTRY OF PERSONNEL

A country must permit entry of personnel of a foreign service supplier into its territory on a non-discriminatory basis.

NATIONAL TREATMENT

A country must accord foreign financial service suppliers access to payment and clearing systems operated by public entities and to official funding and refinancing facilities available in the normal course of ordinary business.

OTHER NON-DISCRIMINATORY MEASURES

A country must not adopt other measures which adversely affect financial services provided by a foreign supplier even if these measures do not discriminate against foreign suppliers.

Telecommunications

GATS applies to public telecommunications systems such as telephone, telex, telegraph, data transmissions and does not apply to radio or television broadcast networks (Annex on Telecommunications). The following requirements only apply where a country has undertaken commitments on telecommunications in its schedule.

GATS requires countries to ensure that foreign service suppliers are provided access to and use of public telecommunications transport networks on non-discriminatory terms and conditions. For example, foreign service providers should be allowed to purchase or lease and attach terminals or equipment which interfaces with the network, to interconnect private leased or owned circuits with public telecommunications transport networks and to use operating protocols of the supplier's choice (Annex on Telecommunications, Para 5).

GATS allows countries to impose restrictions on access to public telecommunications networks only to ensure the integrity of these networks and to ensure that their services are available to the public generally. For these purposes, a country may impose restrictions on resale or shared use of such services, impose licensing, registration and notification requirements, impose a requirement to use specified technical interfaces, impose requirements for the inter-operability of such services, and impose restrictions on inter-connection of private leased or owned circuits (Annex on Telecommunications, Para 5.5 and 5.6).

Air Transport

GATS does not apply to traffic rights or services related directly thereto. Traffic rights govern the routes that various air carriers will take, the type of cargo carried, the rates charged as well as the ownership and control of airlines [Annex on Air Transport Services, Paras 2 and 6(d)]

GATS instead applies to computer reservation services, aircraft repair and maintenance services, and the selling and marketing of air transport services (Annex on Air Transport Services, Paras 3 and 6).

GATS does not impose any specific requirements with respect to air transport. However, any obligations assumed in the Schedule will not affect a country's obligations in existing international agreements—although not stated, this is a reference to the Chicago Convention on Air Traffic Rights.

Labor

GATS allows countries to apply immigration laws to regulate the

entry of persons into their territories and protect the integrity of national borders as long as these measures are not applied to as to nullify the benefits accruing to a member under the terms of a specific commitment. Countries are specifically allowed to apply visa requirements selectively to some countries and not to others (Annex on Movement of Natural Persons). However, GATS allows countries to enter into agreements outside of GATS for integration of labor markets as long as these agreements result in exemption of citizens of parties to the agreement from residency and work permit requirements. Generally, such integration would provide citizens a right of free entry to the employment markets of the parties (Article V). In addition, GATS establishes a negotiating group to discuss further liberalization of movement of labor after the conclusion of the Uruguay Round. This negotiating group is to submit a report to the Council on Trade in Services by January 1996. Commitments resulting from these negotiations shall be inscribed in a country's schedule of commitments (Decision on Movement of Natural Persons).

IMPACT OF GATS ON INDIA

The agreement on Services has shown some consideration for the concern and interests of the developing countries, at least in theory. Thus it lays down (Article XIX.2) that "the process of liberalisation shall take place with due respect for national policy objectives and the level of development of individual members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing countries for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation and when making access to their markets available to foreign service suppliers, attaching to it conditions aimed at achieving the objectives referred to in Article IV." Article IV is about increasing participation of developing countries. This objective is sought to be facilitated by "(a) strengthening domestic services capacity *inter alia* through access to technology on a commercial basis; (b) the improvement of their access to distribution channels

and information network; and (c) the liberalisation of market access in sectors and modes of supply of export interest to them". By far, it is the last element which can be expected to be of operational significance in the negotiations from our point of view.

What is the current state of negotiations in the services area? Admittedly, the process is still on. Indeed, whether the area of financial services will be delinked from the main agreement is still an open question as the Americans have retained the freedom of denying the application of the MFN principle in this area, if the bilateral offers of opening are not up to their expectations. Aside from this, the area of movement of natural persons, that is, the area of exports of our skilled and semi-skilled labour and the area of qualification requirements and procedures, technical standards and licensing requirements in the fields of professional services—the two areas where our interests are paramount—are still in very initial stages of negotiations. All we have is two proposed decisions for adoption at the Ministerial Meeting in April. One such decision pertains to movement of natural persons. According to it, a negotiating group is to be established on the subject and will be required to submit a report no later than six months after the agreement comes into effect. As regards the evolution of transparent disciplines on the question of qualification requirements and procedure, etc., for professional services so as to ensure that such requirements do not become barriers to freer movement of professionals and professional services, again a working party will be established to go into this question and submit, on priority basis, a report on the elaboration of multilateral discipline in the accountancy sector. There is no time limit specified for the report of this working party.

What is important to remember is the 'Annex on Movement of Natural Persons' appearing at the end of the agreement. It lays down the basic limitations on the scope of possible negotiations in this area. It clearly states that "the agreement shall not apply to measures affecting natural persons seeking access to the employment market nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis". Furthermore, it also clarifies that the agreement shall not prevent

a member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory.

It is clear that the scope for negotiations on export of labour and personnel is rather limited. Moreover, the regulation of entry as part of the immigration regime will continue to operate as an effective limitation. This is not to speak of the specific conditionalities that will be attached to a particular sector or sub-sector of services by the country offering such opening—a possibility explicitly recognised in the agreement itself. (An example has recently been reported. The US offered a quota of 65,000 persons per year for 'speciality occupations' in the bilateral negotiations with India. But they put a condition that US employers who would so with to employ the foreign personnel would have to undertake the obligation of recruiting and training sufficient number of US personnel in the speciality occupations—a condition which has effectively nullified the content of the offer.)

All in all, the prospects of substantial gains in sector/sub-sectors of our export interest still appear to be a pie in the sky.

In striking contrast to the rather narrow and hedged-in scope for negotiations on movement of labour, the provisions regarding movement of capital are generously liberal. The agreement lays down (Article XX) explicitly that in sectors where market access commitments are undertaken, the members shall not maintain measures which restrict or require specific types of legal entity or joint venture through which a foreign service supplier may supply a service. Also, no limitations will be prescribed on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment. Furthermore, if a member gives a market access commitment in relation to supply of a service across the border and if movement of capital is essential part of supply of such service, the member shall be committed to allow such movement of capital. Similarly, if a service is being supplied through commercial presence in a members' territory that member will have to permit the movement of capital necessary to establish such commercial presence. Note that by these clarifications, the agreement has established a 'right of establishment' for capital. But the 'right of residence', which is the corresponding equivalent

in the case of labour or labour-intensive services, has been scrupulously excluded.

V.

World Trade Organization: (WTO)

The Uruguay Round of Multilateral Trade Negotiations under the General Agreement on Tariffs and Trade (GATT) were concluded after the most extensive negotiations in the post-War era had been gone through between more than a hundred countries for seven years. In 1986, when the Uruguay Round was launched, it was decided, less explicitly so at the outset, that the elaborate set of rules which would emerge at the conclusion of the negotiations would be implemented by a new multilateral institution. This institution, which during the negotiations, came to be called as the Multilateral Trade Organization (MTO), was expected to be a support for the developing countries to face the challenges posed by the larger trading nations. The end of the negotiations, however, presented the GATT Contracting Parties with a different organization. The concept of the MTO was replaced by the new reality of World Trade Organization (WTO).

The case for a permanent institution for replacing the ad hoc agreement that GATT has been for almost five decades hinged on the argument that such an institution would curb powers of unilateral action assumed by the larger trading countries. In recent past, the larger countries had used a plethora of measures unilaterally, and without any reference to the GATT rule of law, which affected the interests of the smaller countries.

These so-called "grey area measures" went unchecked by the GATT simply because the GATT rules were not equipped to handle them. The most important of these "grey area measures" used against the developing countries has been the Section 301 of the US Trade Act. This instrument has been used by the US

Trade Administration to secure trade concessions from the smaller countries, more often by the threat of trade retaliation. The enormous leverage that the US Trade Administration had thus acquired through Section 301 had become a major issue in the Uruguay Round negotiations and much of the early negotiations on the new trade organization was based on the premise that such unilateral action would be considered illegal.

However, the contours of the functioning of WTO, were defined by the United States, the largest trading nation at the conclusion of the negotiations in December 1993. According to the US officials, the WTO would operate "very much like the GATT does at present". This interpretation provided by the US officials of the powers that WTO would have makes it quite clear that unilateral action under Section 301 of the US Trade Act would continue to be used in the proposed multilateral framework against the smaller countries as at present.

STRUCTURE OF THE WTO

Director General

Secretariat

Ministerial Conference

Composed of representatives of all the Members of the WTO which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and shall have authority to take decisions on all matters under any of the Multilateral Trade Agreements (Art. IV, para 1).

General Council

Shall carry out the functions of the Ministerial Conference between its meetings. General Council shall carry out the duties of the Dispute Settlement Body provided for in the Understanding on Rules and Procedures Governing the Settlement of Disputes. The

General Council shall also carry out the responsibilities of the Trade Policy Review Body. (Art. IV, paras 2-4).

Council for Trade in Goods oversees functioning of GATT 1994 and other Multilateral Trade Agreements (Art. IV, para 5)	**Council for Trade in Services** oversees the General Agreement on Trade in Services	**Council for TRIPs** oversees the Agreement on TRIPs
Committee on Trade & Development	**Committee on Balance of Payments Restrictions**	**Committee on Budget, Finance & Administration**

The function of the WTO is to interpret and enforce the 18 Multilateral Trade Agreements and the 4 Plurilateral Trade Agreements by administering the Understanding on Rules and Procedures Governing the Settlement of Disputes. The WTO's subsidiary body, the Dispute Settlement Body (DSB), will enforce trade agreements by establishing a panel upon the request of the disputing countries after consultations and mediation have failed. The panel, applying the procedures described below will issue a ruling which may be appealed to the Appellate Body. If a party does not comply with the finding of the Appellate Body, a party can request the Dispute Settlement Body to authorize it to suspend concessions granted to the defending party even in an area of trade or under an agreement other than that involved in the dispute, known as "cross-retaliation."

DISPUTE SETTLEMENT PROCEDURES

The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes and shall establish the Dispute Settlement Body.

Dispute Settlement Body (DSB)

The DSB shall administer the dispute settlement rules and procedures, and unless otherwise provided, the consultation and

dispute settlement provisions of the multilateral and plurilateral agreements. The DSB has authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize suspension of concessions. (Understanding on Rules and Procedures on Dispute Settlement "DS Understanding", Article 2.1).

Request for Consultations

Complaining party must notify a request for consultations to the DSB and the relevant Councils and Committees. (DS Understanding, Article 4.4).

10 days: Response to Request for Consultations

A country must reply to a request for consultations within 10 days after it is received (DS Understanding, Article 4.3).

30 days: Consultations

A country must enter into good faith consultations with the complaining party within 30 days after the request is received (DS Understanding, Article 4.3). Consultations may begin within 10 days after the request if dispute is urgent. The parties should attempt to resolve the matter.

Mediation

Mediation and conciliation may be requested by any party at any time. (DS Understanding, Article 5.3). The Director-General may offer good offices, conciliation or mediation with the view to assisting countries to settle a dispute (DS Understanding Article 5.6).

DISPUTE UNRESOLVED

60 days: Request Establishment of Panel

If mediation is entered into within 60 days of a request for consultations, complainant must allow 60 days from the request

for consultations before requesting establishment of a panel. The complaining party may request the establishment of a panel during the 60 days if both parties consider that the good offices, conciliation or mediation has failed to settle the dispute (DS Understanding, Article 5).

Composition of Panel

When a dispute is between a developing country Member and a developed country Member, the Panel shall, if the developing country Member so requests, include at a least one panelist from a developing Member (DSU).

Establishment of Panel

At the latest, a panel shall be established at the DSB meeting following that at which the request first appears as an item on the DSB's agenda unless the DSB decides by consensus not to establish a panel (DS Understanding Article 6).

6 months: Final Report of Panel

A panel must conduct its examination and issue a final report within six months of its establishment (3 months in the case of perishable goods) (DS Understanding, Article 12.8).

60 days: Adoption of Panel Report

Within 60 days after the issuance of a panel report, the report shall be adopted at a DSB meeting unless one of the parties formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report (Understanding, Article 16.4).

60 days: Notify Intent to Appeal

60 days: Establishment of Appellate Body

The DSB shall establish a standing Appellate Body to hear appeals from panel cases. Within 60 days after a party formally notifies its

intent to appeal, the Appellate Body must issue a decision (Understanding, Article 17).

30 days: Adoption of Appellate Body Report

The DSB shall adopt an appellate body report unless the DSB decides by consensus not to adopt the report within 30 days following its issuance (Understanding, Art. 17.14).

30 days: Notify Intent to Comply with Rulings

At a DSB meeting held within 30 days after the adoption of a panel or Appellate Body report, the country concerned shall inform the DSB of its intentions in respect of implementation of the ruling.

45 days: Implementation of Ruling

A country may have 45 days following adoption of the recommendations and rulings to implement the report or a period of time determined through binding arbitration within 90 days following adoption of the recommendations and rulings. The implementation period granted by the arbitrator should not exceed 15 months from the adoption of a panel or appellate body report (DS Understanding, para 21.3). The DSB shall keep the implementation of the recommendations and rulings under surveillance.

Suspension of Concessions

If a country fails to comply with the ruling of the panel or Appellate Body within a reasonable period of time, such country shall enter into negotiations with the complaining party with a view to develop mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after expiry of a reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend application of concessions. (DS Understanding, Article 22.2).

The complaining party should first seek to suspend concessions in the same sector as that in which the panel or Appellate Body has found a violation or other nullification or impairment. If that party considers it is not practicable or effective to suspend

concessions or other obligations with respect to the same sectors, it may seek to suspend concessions in other sectors under the same agreement. If that party considers it is not practicable or effective to suspend concessions with respect to other sectors under the same agreement, it may seek to suspend concessions under another agreement. (DS Understanding, Article 22).

In applying the above principles, the complaining party shall take into account the trade in the sector or under the agreements under which the panel or Appellate Body has found a violation and the importance of such trade to that party; the form of suspension of duty concessions that countries are entitled to, or imposition of penal duties.

This procedure for the operation of the dispute settlement mechanism has been strengthened in the Uruguay Round Agreement. There can be withdrawal of concessions across sectors, viz., goods, services and intellectual property rights. This implies that the WTO framework allows cross-retaliation to take place between sectors. This is similar to that provided under Section 301 of the US Trade Act. The WTO dispute settlement mechanism thus provides legal sanction to the instrumentality of Section 301, and in so doing it supports unilateral action by the United States.

The ruling of dispute settlement mechanism provides for review of the findings of the panel by an Appellate Body to be set up under the WTO. The Appellate Body Report, consequent upon its review of the panel ruling, has to be unconditionally accepted by the parties to the dispute. In other words, there is no other recourse available to the members of the WTO to seek redressal from a distinct higher authority (like the International Court of Justice, for instance) if it feels that the GATT system has not indulged in fair play in considering its case.

An important element of the WTO, which is of critical importance to countries like India having a federal structure and where the rights of the States are set independently of the Centre, is that the rights of the States can be annulled by the provisions of the Agreement in cases where the two are in conflict.

IMPACT OF WTO ON INDIA AND THE THIRD WORLD

The WTO agreement has literally 'annexed' vast spaces of national decision-making to its domain. The entire spectrum of intellectual property protection has been lifted out of the national domain and subjected to the most rigorous and demanding international discipline under 'Annex IC' of the WTO Agreement. And what is worse the discipline is admittedly devised with a view to enhancing the interests and rewards of a small group of owners of intellectual property. The trade in services has been defined in an open-ended manner so as to bring it within the ambit of the General Agreement on Trade in Services (GATS) under Annex 1B of the WTO agreement, any and every possible activity except the essential law making, policing and judicial functions of the state. The question of conservation of natural resources have been subsumed under the misleading caption of 'trade related environment issue' and an international discipline is mandated to be evolved, ostensibly to protect the environment but surreptitously to facilitate new protectionist measures on the part of the industrialized countries. The national public distribution systems will henceforth have to reckon with the parameters laid out in the agreement in the new GATT.

The first and foremost feature of the WTO Agreement is that it establishes an international legislative body with a vast subsisting domain and with a built in provision for continuing expansion of this domain. GATT 47 was essentially a border paradigm. It concerned itself largely with issues arising out of international trade of goods at the international borders. It did not seek to intrude into the sphere of autonomous decision-making of its member states. Not only that. It specifically listed a number of exceptions and recognised the departures from the rules of the border paradigm under certain circumstances. Thus Article XX of GATT 1947 recognised the autonomy of the member-state to have and enforce laws and regulations relating to the protection of patents, trademarks and copyrights, to the conservation of exhaustible natural resources; to restrictions on exports of domestic materials; and the laws and regulations essential for the acquisition or distribution of products in short supply. National autonomy

in such areas of decision making was respected and safeguards were provided only to ensure that the basic rule of the border paradigm ensuring non-discriminatory treatment to every member of the agreement was not nullified surreptitiously.

Furthermore, closely linked to this situation is unprecedented freedom of foreign investments in India by industrial giants will totally ruin India's industrial initiatives and development. Freedom for the rich and the poor alike to enter a five-star hotel is not equal but grossly unjust and unreasonable. But the essence of TRIMS is just this. Freedom to conquer in the Banking, Insurance and other Services unlimitedly left open for corporate giants is integral to GATT but it will guillotine Indian progress. Surrender of our nationalisation policy, public sector control and a regime governed by the Directive Principles of the State Policy will inhibit Indian creativity, scientific and technological advance laboriously built up by 47 years of able leadership and national planning. And this is inimical to our Preambula fundamentals. There are tons more to be said to expose the unconstitutional invasion of India's economy and culture by foreign powers through GATTification. The subject calls for more than space here permits to demonstrate that Dunkel's TRIPS version is GATTAstrophe and unconstitutionality writ large. Indian enterprises will be midgets before U.S. MNCs which have such clout as to silence even the American legal controllerate. *Ralph Nader*, that great consumerist activist wrote in the Seventies:

> "A burgeoning technology is giving corporations more power than they choose to exercise responsibly. Witness, for example, the domestic chemical and biological warfare called, too charitably, pollution. Concentration of economic power develops momentums of abuse in political, social, educational, and union areas. Laws and antitrust and regulatory frameworks have been symbols rather than arms of democratic governing, while the corporate regulatees control the public regulators." [AMERICA, INC.—Page 14]

Recently he has spoken, as an American activist, words which are apt:

"An unprecedented corporate power grab is underway within the Uruguay Round negotiations of a new version of the General Agreement on Tariffs and Trade. By clever manipulation of free trade symbols and dependency between nations, multinational corporations hope to harmonize downwards: consumer protection, environmental and worker safety standards and wage levels. Special burdens are in store for Third World countries, whose sovereignty the multinational companies are hoping to further erode."

When Prime Minister Narasimha Rao recently visited the United States, Nadar wrote to him:

"Your administration, like Clinton's, has argued that the interests of the world's population will be best served by a trade agreement that transfers power to a secretive and unaccountable group of technocrats in Geneva. Citizens groups in this country and yours have countered that the best interests of the world's people can be realised by shifting power to the grassroots. That's an argument that democratically minded people in both our countries should be able to appreciate".

Leading Congressmen are quoted as saying that the U.S. would be able to use the WTO selectively to its advantage and that the U.S. being so powerful it could "ignore W.T.O. directives that counter its interests". What is disheartening to Third World countries like India is that:

"the US can use the trade agreement to force open markets of the developing countries. "The United States would be most likely to use provisions of the new trade agreement to force open the markets of India and other developing nations that have a history of using local laws to block US products," Matsui said.

"Matsui," Nader told Rao, has "confirmed the deepest concerns of the people of India, who have organised large demonstrations to denounce GATT because they believe it will benefit rich countries at the expense of poor ones."

"Matsui's comments, Nader wrote to Rao, "are particularly regrettable coming as they did during your official visit to the United States. This kind of talk is as ignorant as it is arrogant. The WTO would have the power to impose trade sanctions if it ruled that a country had improper

trade barriers. Unfortunately, only secret WTO panels would make this determination. GATT panels in the past have been quite broad in determining what constitutes a trade barrier. The much more powerful WTO will apply sanctions to an even broader scope of non-tariff activity". [PTI report published in the "Indian Express"]

Even a country like France has accused the U.S. quite recently of unfair trade practice.

"Mr. Longuet said on Thursday that the US was not playing by the GATT free trade rules by using its muscle to back a recent intensive export drive by its domestic industry."
[The Economic Times, Madras—Friday 29.7.1994]

Tall and strong though the U.S. is, even among the Americans, GATT is suspect. There is a lobbying group, 'Alliance for GATT NOW', which is a U.S. coalition of businesses formed to promote immediate implementation of GATT. This world trade pact is regarded by big businesses in the U.S. as good because they will face fewer barriers abroad for sale of wares from air-planes to soyabeans. This boost will benefit big corporations. Even so, "some critics claim the treaty will overturn federal and State health, environmental and safety laws. How ? By giving GATT more power to rule that U.S. laws unfairly restrict trade . . ." (U.S.A. TODAY dated 21.7.1994). Another opposing view is significant and relates to the jurisdiction of the WTO.

"The WTO could erode U.S. sovereignty and democracy and undermine environmental, consumer, fair tax and other laws ... the guaranteed consequence of approving it (i.e. GATT) is establishment of the deeply disturbing WTO, in which tribunals of three faceless bureaucrats would judge foreign challenges to some of our most important laws. And WTO's rules put maximizing trade liberalization ahead of other values such as safety, the environment or living standards. Congress would be required to kill laws declared WTO-illegal or we would face international economic sanction. There would be no appeal. As one member of Congress said, it's like having guns pointed at each temple and no real choice. Twice before, Congress has rejected proposals for such a powerful global trade bureaucracy while accepting expanded trade rules.

And unlike other powerful international bodies, WTO's decision-making would be one-nation, one vote, without sovereignty safeguards such as our veto at the United Nations. And unlike the United Nations, the WTO would operate in secrecy.

Major U.S. trading partners (the European Union, Japan, Canada) have openly published lists of U.S. laws they hope to attack, including meat inspection, food labeling, pesticide limits, the nuclear non-proliferation act, auto fuel efficiency standards, state tax laws, recycling laws, even electric shaver safety regulations.

Sounds too outrageous to be possible, except proponents, *mainly the country's biggest corporations*, hope Congress fixated on health care will OK the deal. Some speculate the rush is to blur the details, which might also explain why Vice President Gore refused an invitation to debate Ralph Nader on the issue on *Larry King Live*."
[USA TODAY dated 21.7.1994]

How impressive is this criticism from the citizens of the Super-Power! Their apprehension is about sovereignty, about safety laws, about environmental laws etc. being in peril if the super-super-power, namely the W T O, takes over global trade regulation and adjudication. Kindly see how more alarming it should be for India and its sovereignty. All persons concerned with the Indian Constitutional Order must be in consternation that its social justice values, its sovereignty and its fundamental rights and duties of citizens will be in great jeopardy. The common American speaks up but the masses of Indians in their millions keep dumb and uninformed while their very sovereignty and other constitutional fundamentals are being negotiated away. There is much in the charge that GATT is a gun aimed at our Constitution.

The U.S. uses its political muscle and other blandishments to capture markets, thus betraying even the GATT mandates. France feels aggrieved about U.S. practices and gives instances. "We are still far from the free trade situation of which the Americans pretend to be the champions", Mr. Longuet, the French Industry and Foreign Trade Minister, bitterly complained. He even stated that President Clinton pressured Saudi Arabia to place orders for aircraft to Boeing Company, by-passing the European Airbus consortium. Uses of grounds *other than commercial* are applied by

the U.S., according to other advanced countries like France, which are worried about the U.S. manouevres. How can a pygmy like India pretend that GATT will provide *an even playing field* when the U.S., with its military might and other oblique measures, is the competitor.

It looks as if the sole super-power of the economic and political cosmos would lord it over the weaker nations even where some of the GATT provisions may benefit countries like India by distortion in dispute resolution.

It is good to remember that not the common people of America but giant corporations, who even now control the policies of Washington DC, will benefit by bending GATT to get the most out of it against the people, be they American, Indian or other. M.N.Cs. are the de facto controllerate of U.S. economic policy.

When we glibly talk about an even playing field, we must ever remember that a bout between a giant M N C and Indian mannikin enterprise can never, never be on equal terms in the game. The concentration of Industry, its lack of social responsibility, its mendacious advertising, its wrecking of the environment and its subversive operations in foreign countries is allergy to thinking Americans and anathema to democratic minds of America. Such is the view of researchers and social activists in the U.S.

Chapter 6

Summary of Written Submissions

ON THE SOCIO-ECONOMIC IMPACT OF THE FINAL ACT

Submissions by the Indian Drug Manufacturers Association on the Impact of the TRIPS Agreement on Drugs and Medicines

The Indian Drug Manufacturers Association (IDMA) submitted that the TRIPS Agreement would have serious implications for the future of the Indian drug industry and, consequently, the sufficient availability of drugs at fair prices.

The Submissions by IDMA began by pointing out that, under Article 27.3 of the TRIPS Agreement, the terms "inventive steps" and "capable of industrial application" are to be interpreted as allowing patentability for inventions which are "non-obvious" and "useful". However, this criteria would enable new combinations or formulations of an existing drug to be patented on the grounds that the new formulation is "non-obvious" and "useful". In this manner, most of the existing drugs in respect of which patents have long since expired, may be re-patented by claiming a different formulation or use or combination.

IDMA further submitted that none of the units in the national sector of the industry possess the huge financial and other infrastructural resources required to undertake original research work leading to invention of new drugs because of the rigid price controls resulting in narrow profit margins. The existing R&D is limited to invention or developing new and more economical processes for production of known drugs.

The IDMA submissions drew attention to the fact that, in his deposition before the Gujral Committee, the Secretary, Department of Chemicals, conceded: "If these proposals are accepted, then the growth of the drug industry in regard to the new drugs would get adversely affected." The Secretary further stated, "The effect would be felt in new drugs like anti-AIDS drugs, anti-cancer drugs, cardio-vascular drugs, etc. These drugs will be affected. How much prices will go up of these patented drugs which will be under product patent afterwards, that will again depend on a number of factors..."

According to IDMA, the weakened Indian pharmaceutical industry will never be able to acquire capacity for original research and dependence of the country and consumers on foreign sources will become perpetual and complete because of the regime providing protection for product patents and importation.

IDMA pointed out that attempts are made to underplay the effect of the product patent regime contemplated under the TRIPS Agreement by claiming that out of 250 drugs recommended for the WHO drug list, only 10 to 20 are covered by live patents. It is overlooked that the WHO list covers only a *de minimus* range of drugs for the time being recommended as necessary for primary health centres. For complete health care many more drugs are required and are regularly being used in public and government hospitals. Witnesses appearing before the Gujral Committee deposed that 42% of anti-biotics and anti-asthmatics, 66% of anti-ulcers, 51% of cardio-vasculars, 98% of anti-bacterials, and 89% of contraceptive hormones in use in India are still under patent in the U.S.

IDMA pointed out that the Commerce Minister, Mr. Pranab Mukherjee stated in the Lok Sabha that "There is a possibility that our prices of medicines and some of the drugs will go up." The former Commerce Minister, Mr. P. Chidambaram stated that the price of drugs may go up 5 to 10 times.

Submission by Mr. B.K. Keayla, Convenor, National Working Group on Patent Laws on the Impact of the TRIPS Agreement on Pharmaceuticals

This submission deals with some of the provisions on patents in the TRIPS Agreement in the Final Act.

SCOPE OF PATENTABILITY

Product or process patents

The scope of patentability in the TRIPS Agreement has been considerably enhanced as compared to the Patents Act, 1970. Art. 27 provides that "patent shall be available for *any* inventions, whether products or processes, in any fields of technology, provided they are new, involve inventive steps and are capable of industrial application." This provision makes all industrial products and processes patentable.

Art. 28 in Sub-article (a) deals with the *exclusive* rights where the subject matter of a patent is a product. Sub-article (b) of this Article deals with exclusive rights where the subject matter of a patent is a process. Art. 34, in turn, deals with burden of proof in process patent regime. Close analysis of these three articles/ sub-articles indicates that there can be two independent regimes, viz. a product patent regime and a process patent regime.

Art. 33 deals with the term of protection which "shall not end before the expiration of a period of twenty years counted from the filing date." The interpretation of this could be that both the regimes can have protection of twenty years each.

Exclusive rights under Art. 28 extend to "using" of the patented product or product produced from patented process. In the drugs and pharmaceuticals and agro-chemical fields, exclusive right of "using" has special significance as protection will get extended to the manufacture of tablets, capsules, injectables, syrups, etc. in the dosage form, usage form and/or combination form. Thus, these products which are manufactured after using the protected product can have an independent patent regime. By implication, protection for such a patented regime could also be for twenty years.

New products are, in any case, going to enjoy the above three regimes which could run concurrently or successively. An astute patent holder can certainly enjoy protection for a period of forty years and can have it extended for a longer period.

Further, during the process patent regime, a patentee could invoke Art. 34 relating to reversal of burden of proof which would discourage any competitors. Even if the competitors do emerge

by having innovative processes, their number would be restricted to two, three or at the most four. In the case of biological products, there would unlikely be any other competitors.

Thus, the scope of the new patent protection would be of the absolute monopolistic type during the product patent regime and during the process patent regime there will likely be monopoly through cartelization by two, three or four manufacturers. The implication of this kind of monopolistic regime is obvious qua availability of patented products and their prices. The monopoly prices would place medicines out of the reach of 70% to 80% of the population.

The process patent regime and the exclusive right of "using" of products produced from patented processes would get extended even to the older products as it is possible to claim patent protection over innovative processes or innovative usages of existing/older products. The extensive monopoly rights created under the TRIPS Agreement will mean that 60% to 70% or even more of turnover will be covered by some patent protection or the other.

Micro-organism

Article 27 sub-article 3(b) requires patenting of micro-organisms. Under the Patents Act, 1970, there is no protection for micro-organisms. The TRIPS Agreement will accordingly have serious implications for research in bio-technology, fermentation technology, etc.

Art. 27 Sub-article 3(b) also provides that "plant varieties protection *shall* have to be provided by patents or by an *effective sui generis* system or by any combination thereof. The countries like India which do not provide for such patent protection would naturally opt for a *sui generis* system relevant to them. This freedom is, however, shortlived because the same sub-article provides that this kind of system shall be reviewed four years after entry into force of the TRIPS Agreement. This would mean that GATT would certainly develop a new "plant breeder right" system on the same lines as they are providing for patent regimes for industrial products. Obviously, monopolistic protection would be provided to the plant breeder rights also. Further, there is confusion raised

about the adoption of the *sui generis* model for plant protection as there are two models available at present, viz. UPOV Convention 1978 and UPOV Convention 1991.

Under Art. 65—sub-articles (1), (2) and (4), countries including India are entitled to a ten year transition period for adopting the TRIPS patent system and evolving a *sui generis* system for plant protection. As a totally new model would likely emerge after GATT reviews the plant breeder rights system in four years, India will per force have to adopt this new model which would create monopoly rights. There is no doubt that farmers will lose their rights to new seeds as control over the breeding, use and sale would be controlled by plant breeders.

COMPULSORY LICENSING/LICENSING OF RIGHTS/USE WITH AUTHORISATION/SUB-LICENSING

Unlike the Patents Act, 1970, there is no provision in the TRIPS Agreement for "compulsory licensing" or "licensing of right" provisions which are aimed at ensuring that the patented invention is sufficiently available to the public at reasonable prices.

Art. 31 provides that national laws may allow the subject matter of a patent to be used without the authorisation of the patent holder. The scope of "other use" has been limited to non-commercial use. This authorisation may be granted by the Government on a case by case basis provided that the proposed user has made prior efforts to obtain authorisation from the right-holder on commercial terms and conditions and that such efforts have not been successful within a reasonable period of time before the said Government authorisation.

The Government can also authorize use of the subject matter of a patent in the case of a "national emergency" or other circumstances of "extreme urgency" or in the case of "public non-commercial use." However, even under such emergency conditions, authorisation may be terminated when the circumstances which led to it cease to exist or are unlikely to recur. Compensation must also be paid to the patent holder based on the economic value of the authorisation. Further, the TRIPS Agreement expressly

provides that the propriety of the authorisation may be challenged in court.

In sum, the TRIPS Agreement does not allow use of a patented invention without the authorisation of the patentee for commercial purposes and narrowly circumscribes non-commercial use even under emergency conditions. This results in a complete reversal of the existing patent regime which provides for compulsory licensing and automatic licenses of right to ensure that patented products are sufficiently available to the public at reasonable prices.

IMPORT MONOPOLY

Article 28 confers patentees with "exclusive rights" to import patented products or products produced by a patented process. This provision precludes even the Government from importing patented inventions. The result will be to allow patentees to establish import monopolies over even basic items such as medicines even where there is no domestic production of the same invention.

TRANSITIONAL ARRANGEMENTS

The transitional arrangements under Article 65 allow ten years for amendment of the Patents Act, 1970 to provide for product patent where no such patent protection is available. However, this transition period is reduced by Articles 70(8) and 70(9) whereunder means have to be provided to accept product patent applications for patent protection of pharmaceutical and agro-chemical products as of 1995. In addition, such products must be granted exclusive marketing rights for five years by the concerned authorities.

Submissions by Mr. S.P. Shukla, Former Commerce/ Finance Secretary, Government of India

The Government's case in favour of the Final Act rests on three

basic arguments. First, it is argued that the new agreements will open up substantial export opportunities for India, particularly in textiles, agriculture and services. The *textile exports* are of prime importance for us as they constitute around 30% of our total exports. In the past, this sector of international trade has suffered most inequitous and discriminatory treatment at the hands of importing industrialized countries. The agreement to end this discrimination in 2005 is, therefore, welcome. However, the history of the trading system does not encourage one to put too much trust in a distant promise reluctantly held out by governments notoriously vulnerable to powerful lobbies of their inefficient textile industries. The caveat introduced by the U.S.A. at the last moment to subject their offers of improved access for the textile exports from India to additional conditions of counter-access into the Indian market is ominous. European Union (EU) declared its intention to follow the footsteps of U.S.A. and negotiate access for their textile products in the Indian market. These developments have cast a long shadow of doubt on the process of negotiated liberalization which is yet to be launched.

Even the ardent supporters of the new agreements cannot disguise their deep disappointment at the "backloading" of the process. Only 16% of the existing quotas will be abolished in 1995, 17% in 1998 and another 18% in 2002, while the entire remainder of 49% will be preserved for abolition on the final day of the transition period i.e. 2005 A.D. To compound the exporters' handicap further, these percentages will be calculated on the basis of the entire universe of textile and clothing items. In other words, E.U. and U.S.A. will be at full liberty to "count in" for this purpose even those items that are not under any quota restriction at present. A realistic view is that both E.U. and U.S.A. will be able to "achieve" the targeted liberalization of their markets for 2002 A.D. without actually relaxing any of the existing quotas.

Coming to *agricultural exports*, the real potential for us is in the area of processed products. The constraints on expansion of these exports are more in infrastructure, marketing and technology. They need to be handled independent of the new agreement.

Indeed, in one respect, there is a real likelihood of the new agreement creating additional hurdles for such exports. The Agreement on Sanitary and Phytosanitary Standards may only strengthen the non-tariff barriers which are currently enforced individually selectively by some countries. The Agriculture Agreement, in turn, does lay down a regime of reduction of subsidisation—both domestic support and export subsidies—for the major culprits viz. E.U. and U.S.A. However, the reductions in domestic support will be quantified only in the schedules of commitments to be filed by the countries. The expectation is that the reduction to be attained will be 20% of the base levels. Therefore, both U.S.A. and E.U. will be within their rights to maintain in 2001 their budgetary outlays for export subsidies and the quantities benefitting from such subsidies at a level as high as 64% and 79% of 1986-1990 base period levels, respectively. Similarly, they will be retaining the domestic support at the level of 80% of the base levels in the year 2001. The residual levels of support will still be massive and may be several times more than the maximum permissible domestic support levels to developing countries. What is more, the industrialized countries have the full flexibility of achieving the quantitative targets for reduction of support by reducing such support more than the targeted level in some products and not reducing the support at all in some others. In such a scenario, it requires extraordinary disregard for realism to project enormous export prospects in agricultural products as a result of the new agreements.

The third area is that of the so-called trade in services. Our export potential is admittedly in the labour and labour-intensive areas. However, the GATS has blocked liberalization of labour movements. Immigration regimes remain intact under the GATS.

The second argument of the Government in favour of the Final Act is that damage in the area of intellectual property rights has been effectively limited. The Government claims there will be no adverse effect despite the sound arguments advanced questioning the modest percentages of medicines affected which are quoted by government spokesmen. And notwithstanding the much publicized ten year transition period, the new agreement

makes it incumbent on us to provide exclusive marketing rights from the day after the Final Act comes into force in 1995. This combined with the doctors' tendency to always prescribe "new" medicines, will inevitably engender a process of higher prices for important medicines leaving the poor only the option of not buying the new medicines and remaining content with old generation drugs regardless of their shortcomings or side effects.

On seeds, within a period of five years, we will have to enact a *sui generis* system for protection of the rights of plant breeders. Such a system will have to be "effective" in the eyes of the Council for protection of intellectual property rights under the World Trade Organisation. It is nothing short of falsehood to claim that "effectiveness" of the system will not be judged by the multilateral body. The only yardstick available for the industrialized countries to judge the effectiveness is in terms of the version of the International Union for Protection of New Plant Varieties—UPOV 1978 and UPOV 1991. The brahminical sophistication about UPOV 1978 being acceptable is either naive or duplicitous. It is the plant breeders lobbies which "upgraded" UPOV 1978 to UPOV 1991 and it is the same lobbies which have brought in the section 27.3(b) of TRIPS to prescribe a universal obligation to provide protection for their rights. It is misleading to project that, after locking ourselves to the new system, we shall still be able to present the universalisation of UPOV 1991—which virtually amounts to patenting of seeds.

The third argument raised by the Government is based on the belief that the new regime represented by the World Trade Organisation Agreement and all it comprises represents a truly multi-lateral, rule based system and, therefore, the only hope for an equitable and just international order on trade. Even a cursory acquaintance with the origin and operation of GATT, the history of pressure and armtwisting that pervaded the Uruguay Round have made clear the inequitous, intimidatory and G-7 biased character of the new regime. The Final Act has created a permanent institution and forceful modalities for the G-7 countries and their transnational corporations to continuously intrude into and occupy the sovereign economic space of the third world.

ON CONSTITUTIONALITY OF THE FINAL ACT

Submissions of the Public Interest Legal Support & Research Centre (Represented by Dr. Rajeev Dhavan, Senior Advocate, Supreme Court of India)

1. The Indian Constitution lays down no formal procedure for the discussion and ratification of treaties. The treaty making power vests with the Union Government. This is not directly granted to the Executive but flows from the general power of the Executive to fulfill and execute the legislative power of the Union. Elaborate lists demarcate the respective legislative powers of the Union and the State as well as the areas on which they share a concurrent power in respect of which priority is given to the Union over the State. The Legislative Power of the Union contains provisions for international negotiations and treaty making which include:

(a) "Participation in international conferences, associations and other bodies and implementing of decisions made thereat."
(b) "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries"

(Constitution, Article 246 read with Schedule VII, List I, E.13, 14)

2. The extent of the executive power of the Union is described in Article 73 of the Constitution:

Subject to the provisions of the Constitution, the executive power of the Union shall extend

(a) to the matters with respect to which the Parliament has power to make laws;
(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

3. Under the scheme of the Constitution, Parliament should lay down elaborate procedures placing the treaty making process in a context of information sharing, accountability and consultation. This procedure could require ratification by Parliament of all treaties, require consultation with State legislatures or subject

treaties to national referenda. However, if Parliament does not pass any law at all, the executive power remains untramelled. The question then is whether the Union has the power to enter into any treaty or agreement or participate in international conferences and meetings in the absence of enabling legislation?

4. If the executive retains the power to do what it likes on all matters on which Parliament can make laws and implement treaties and international agreements, a paradoxical situation is created. If Parliament legislates, the power of the executive is limited by such legislation. If, however, Parliament fails to legislate, the power of the Union becomes uncontrolled and unlimited. This seems a strange way to run a representative, and constitutional democracy. The less legislation there is, the greater the power of the Union. But it is precisely this paradox that has been written into constitutional interpretation by the Supreme Court in its decision in the *Punjab Text Book* case (*Ram Jawayya Kapur v. State of Punjab*, AIR 1955 SC 549). The upshot of all this is to create a very wide-ranging power which can only be modified when legislation modifies its extent and use.

5. Furthermore, no exercise of executive power can interfere with the fundamental rights of citizens. It follows that where there is a treaty that affects the fundamental rights of citizens, such a treaty is void as soon as the transgression is demonstrable. It does not have to be shown that the transgression is an unreasonable restriction. The test for determining the transgression of fundamental rights is that the direct and inevitable effect of the exercise of that power (or, making of a treaty) is that it will affect fundamental rights (see *Maneka Gandhi v. Union of India*, AIR 1978 SC 597).

6. The effect of this is that the Government of India does have the power to attend international meetings and conferences and enter into treaties and agreements. But, since this exercise of treaty making power does not stem from any legislation and is merely part of the executive power of the Union, it cannot transgress the fundamental rights of persons and citizens in India. If the treaty making power were controlled by enabling legislation (under Schedule VII, List I, Entry 13 and 14) such a power would become a statutory exercise of power. As a statutory exercise of

power, it could intrude into fundamental rights only to the extent to which this is permissible by the Fundamental Rights Chapter of the Constitution itself.

7. In order to resist a Fundamental Rights challenge to exercise of the treaty making power, there are two thresholds that any such exercise must cross in order to pass constitutional muster. The *first* is the simple but absolute requirement that any transgression of fundamental rights must be backed by the authority of enacted law. If there is no enacted law, that is the end of the matter. The *second* threshold is that where the power is exercised pursuant to enacted legislation, the legislation itself and any power exercised under it will further be tested by various tests of constitutional limitation. As things stand at present, India is negotiating the GATT treaty under its general executive power and not as result of any authority emanating from legislation. That being the case, the validity of the GATT treaty will be tested at the first threshold by the stringent test that no violation of fundamental rights can take place at all irrespective of whether it is reasonable or unreasonable. The constitutional embargo is absolute, unequivocal and uncompromising. The application of the second threshold test simply does not arise.

8. A second line of reasoning emerges from the recent judgment of the Supreme Court in *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 that the exercise of executive power cannot be destructive of the basic features of the Constitution, *inter alia*, federalism, democracy and secularism. The executive power cannot travel outside the basic structure of the Constitution.

9. In order for a treaty to give rise to rights and obligations within the territory of India, they must be incorporated into legislation (see *re Berubari*, AIR 1960 SC 845; *Maganbhai v. Union of India*, AIR 1969 SC 783). However, once a treaty is negotiated, under Article 253, the Union Parliament has the power to enact implementing legislation even if such legislation encroaches on legislative areas which are exclusively reserved for the States. The Union Legislature is empowered to pass implementing legislation which can ingress into the exclusive legislative power of the constituent states. The important consequence which flows from this is the threat of collapsing Indian federalism into a unitary state.

10. However, the scheme of the Constitution is that the power of the States cannot be taken away without their consent. Thus, the Council of States (Rajya Sabha) can request the Union Parliament to enact legislation on behalf of the States. Two or more States can request the Union to legislate in the executive field of the State (Articles 249 and 252). The executive field of the State (Articles 249 and 252). The executive power of the State may be entrusted to the Union on the basis of consent. It seems incongruous that through the non-statutory exercise of executive power, the Union can appropriate the legislative (and consequently the executive) power of the States. It is a moot question as to whether the Union has the power to negotiate a treaty which intrudes on to the executive and legislative power of the State without making special arrangements to do so. The scope of this power of the Union Parliament needs to be interpreted so that only incidental intrusion into the State List is permitted. Any other interpretation would make Indian federalism a vulnerable casualty in the hands of the executive treaty making power.

11. Even if we interpret the Union Government and Parliament's treaty making empowerments widely to conclude that these powers extend substantively over all areas (including those occupied by the State List), there is all the more reason for mandatory consent and consultation to be read into the Constitution so that States are not deprived of their powers without their consultation and consent. Accordingly, the State Governments would be well within their rights to raise a dispute with the Union Government to demand that the Supreme Court of India determine the manner and extent to which the treaty making power in India's federal system must be subjected to the processual discipline of natural justice on the basis of the informed consent of the States. The argument is premised on the assumption that the GATT will interfere with the federalism of the Constitution which is part of its inalienable basic structure (see *Kesavananda v. State of Kerala*, AIR 1973 SC 1461) and directly intrudes into the power of the States in the crucial areas of agriculture, industry, agricultural taxes, trade and commerce, and public health. For GATT to restructure the Indian federal system without any kind of consultation is a constitutional travesty.

12. A second threat is that to democracy. The negotiation and signing of the Final Act raises the question of whether these actions were undertaken as a clandestine conspiracy which permitted neither transparency nor accountability of decision-making, the seminal aspects of democracy. It must be ascertained whether the Union Government has complied with its duty of accountability to the people by keeping Parliament, the President and the people informed of India's stance at the GATT negotiations, the reasons for such stance and any changes thereto, the negotiating position of other nations and the impact of GATT, as it emerges from the Uruguay Round, on the Indian economy and the rights of its citizens.

13. A third threat to the basic features of the Constitution is that to sovereignty. Sovereignty has two aspects—external and internal. Internal sovereignty means that the Union and State Legislatures retain the power to legislate all laws necessary for the well being of the people. However, the Final Act restricts the ability of the Legislatures to pass laws by regulating virtually every sector of the economy and vesting the power of interpretation of the Final Act in the Multilateral Trade Organization. The Final Act also requires a delegation of the sovereign executive power to the Multilateral Trade Organization which is empowered to authorize retaliation against particular nations.

14. It is respectfully submitted herein that Constitutional safeguards have failed to come into play so that the negotiation of the Final Act has contravened all norms of democratic governance including transparency of decision making based on informed consent and accountability for such decisions. Parliament has failed to pass legislation as to the extent to which India can make commitments in areas in which the States have exclusive legislative power. For its part, the Union of India has also failed to specify at GATT that commitments which would result in loss of legislative or executive powers of the States could only be made upon obtaining the consent of the States. The signing of the Final Act would, moreover, result in collapse of the federal structure of the Republic, adversely affect the fundamental rights of citizens and dilute India's sovereignty. In sum, India's negotiations of GATT and any acceptance of the Final Act are politically and constitutionally *mala fide.*

Submissions by Sh. R. Venkatramani, Sh. Raju Ramachandran, and Sh. Prashant Bhushan, Advocates, Supreme Court of India

Written submission were made to the Commission by the Learned Counsel Mr. R. Venkatramani, Advocate, Mr. Raju Ramachandran, Advocate, and Mr. Prashant Bhushan, Advocate. These Submissions began by noting that the new treaty is qualitatively different from treaties which have been signed by nation states in the past in that it goes beyond extra-territorial issues and seeks to bind nations to following certain domestic economic policies thereby making deep inroads into their sovereign decision making.

Counsels submitted that a treaty, the implementation of which would require an amendment of a law should be ratified by Parliament before being signed by the Government. It was further submitted that a treaty, the implementation of which would require a Constitutional amendment, should be ratified by the constituent power of Parliament before it is signed by the Government.

Counsel submitted that a treaty, the implementation of which would violate the basic structure of the Constitution, is wholly unconstitutional and cannot be ratified by the Government. For example, a treaty which obliges India to turn its back on democracy or give up its sovereignty by requiring it to frame its economic policies on the dictates of a foreign state would be violative of the basic features of the Constitution. It was submitted that the courts in such cases would be fully justified in restraining the Government from entering into such a treaty.

Counsel submitted that it has been held by the Supreme Court that the essential powers of legislation cannot be delegated by the legislature to any other body and the legislature cannot abdicate its responsibilities for framing laws by saying that the laws framed by another body in the future would be deemed to be incorporated as the laws framed by the legislature. It has been consistently held by the Supreme Court that this would be an unconstitutional delegation of legislative powers which falls foul of Article 245 of the Constitution. Therefore, compliance with the provisions of the new treaty would result in an unconstitutional delegation of legislative power.

Counsel submitted that the right to health has been specifically

held to be a fundamental right under Article 21 in a series of Supreme Court judgments beginning with *Bangalore Water Supply Corporation*, AIR 1978 SC 548, *M.C. Mehta v. Union of India*, AIR 1987 SC 395, *Vincent Panikulangara*, (1985) 2 SCC 185 and *Parmanand Katara*, (1986) 2 SCC 285. However, the TRIPS Agreement which allows the patenting of methods of agriculture and food and medicine products violates the right to health. Counsel relied on *Ajaib Singh v. State of Punjab*, AIR 1952 Punjab 309 for the proposition that fundamental rights guaranteed under Part III of the Constitution cannot be derogated from on the grounds that such derogation is necessary for the purpose of giving effect to the treaty obligations of India.

Submissions by the National Law School of India University, Bangalore

Represented by Prof. T.K. Bhaskar, Prof. V. Lakshminarayanan, Prof. R.V. Anuradha and Prof. V. Umakanth.

ON MODIFICATIONS OF EXISTING LAWS REQUIRED BY THE FINAL ACT

The Submissions of the National Law School elaborated on the provisions of exiting law which will have to be changed if the Final Act is enacted. The Agriculture Agreement will require repeal of Section 3 of the Essential Commodities Act, 1955 which empowered the Central Government to issue notifications to regulate prices and setting procurement prices for foodstuffs. Similarly, Sections 45-48 of the Customs Act qua importation and Section 51 of the Act qua exportation will be affected. Section 11 of the Customs Act will be affected because there should be equivalent treatment between Indian and foreign parties.

The Submissions of the National Law School examined the existing laws which will be affected by the TRIMS Agreement. A legislation which will be affected is the Foreign Exchange Regulation Act, 1973 which places restrictions on the flow of foreign exchange and on the establishment of foreign companies in India. Section 11 of the Industries (Development and Regulation) Act, 1951 confers

the power of licensing of new industrial establishments to the Central Government. The Final Act seeks to deprive the government of the power to impose conditions in the nature of investment requirements for the grant of a licence. Other affected enactments are the Companies Act, 1956 which regulates the functioning of foreign companies and the Foreign Trade (Development and Regulation) Act, 1992 which governs exports and imports.

The GATS Agreement, in turn, will require changes in existing Indian Laws. The liberalization of services in GATS will require changes to the Banking Regulations Act, 1949 which empowers the RBI to license, control and regulate commercial banks, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 which provides for the nationalization of banks and the Reserve Bank of India Act, 1935 under which the RBI has been given extensive powers to control and regulate commercial banking in India. In addition, the Final Act will affect the Life Insurance Corporation Act, 1956 which nationalized the life insurance business and the General Insurance (Business Nationalization) Act, 1972 which nationalized the business of general insurance in India. The Indian Telegraph Act, 1885 which gives the exclusive privilege of establishing, maintaining and working telegraphs and telephones to the Central Government will also be affected. In the area of air transport, the Air Corporations Act, 1953 which nationalized air transport in India and the Aircraft Act, 1934 which empowers the Central Government to control the manufacture, possession, use, operation, sale and export of aircraft will be affected.

The Submission of the National Law School relied on the judgment of the Supreme Court in *Maganbhai v. Union of India* which stands for the proposition that where a treaty operates to restrict the rights of citizens or modify existing laws, then legislative sanction is necessary to give effect to the treaty.

ON THE EXECUTIVE POWER TO ENTER INTO A TREATY

The Submissions of the National Law School began by observing that the executive power of entering into a treaty is set forth in

Article 73(a) read with Entry 13 and 14 of List-I of the Seventh Schedule. The scope of Article 73(a) was discussed in *Jayantilal Amritlal v. F.N. Rana*, AIR 1964 SC 648 where the Supreme Court held that the power under Article 73(a) will not extend to matters in Lists II and III save as expressly provided in the Constitution. In support of this view, the National Law School submitted that, in *Hara K. Chand v. Union of India*, AIR 1970 SC 1453, the Supreme Court held that the rule is that "widest amplitude should be given to legislative entries." But when two entries in different lists appear to be in direct conflict with one another, then the duty of the court is to reconcile the entries and bring about harmony between them. It is a well-recognized canon of interpretation that a general power should not be interpreted so as to nullify a particular power conferred by the same instrument. The purpose of harmonious construction is to see to it that no entry is robbed of its entire context and made nugatory. It follows that a general power such as that in Entries 13 and 14 of List I cannot be exercised so as to make the specific powers of List II and List III redundant and nugatory.

Accordingly, the subject matter of the treaty would have to be taken into account. If it is a subject within List II or List III of the Seventh Schedule, then the exercise of Executive Power over such subjects is invalid since no provision of the Constitution states that there are no limits on the exercise of executive power to make a treaty. It follows that the Executive cannot, in exercising his power under Article 73, enter into a treaty which covers subject matter in the state or concurrent lists.

Chapter 7

Constitutionality of the Final Act

CONSTITUTIONAL BASICS

Our Constitution is federal, not unitary, and any treaty which travesties or tampers with the federal natural and consequential power of the State must be tested on the Constitutional anvil. In short, treaty-making power is not a totalitarian authority of the Union subversive of limited sovereignty that resides in various repositories under the Constitution.

Basu makes a significant observation about Art. 253. He says that Parliament shall be competent to legislate on List II items, if necessary, to implement treaties or agreements. "*But other provisions of the Constitution, such as the Fundamental Rights, cannot be violated in making such law*". [Constitution of India by BASU, 1994 Edn. Page 858]

Federalism with liberal autonomy lends viability to the founding creed of provincial diversity and central unity. Centralism was an imperial instrumentation with Whitehall as the seat of the High Command, Westminster as the Controllerate of the empire and London as the key to India. This Raj syndrome was not merely an axiom that all power must vest in the British Crown but a negation of that categorical imperative of substantive regional autonomy and federal distribution of sovereignty sans which Independence lost its significance. Freedom is not free if people feel that right and justice social, cultural, political and economic, is still in distant Delhi deposited with the pro tem upper echelons in the capital Gandhiji always emphasised that self-government

meant decentralism, that, absent Panchayati Raj, concentration of Power alienated the people from participatory governance and representative rule. The social-political soul and economic-cultural conscience of Independence desiderated maximisation of vertical and horizontal distribution of power, and not a reincarnation of the Government of India Act 1935 made by Westminster, with some quasi-federal phrases and crimson diction super-added but otherwise functionally a carbon copy of a machine made in imperial Britain and operated Whitehall-fashion from Delhi. The historic tryst with destiny millions of Indians made at midnight in the middle of August, 1947, and the Quit India movement the Mahatma inspired by a 'do or die' struggle, had a vision, of a Secular Socialist Democratic Republic where every minority mattered, every territorial diversity found expression, every tribal layer and level of popular sub-nationalism had title to appropriate self-determination and appropriation of sovereignty within the federal wholeness. Its integrity was inviolable, founded on an egalitarian fraternity, social justice, dignity and personality, and actualised in autonomous enjoyment of human and material resources. If Gandhiji is the father of the nation; if the noble Preamble of the Constitution is not fraudulent diction and festooned phrases strung together, if 'we, the People of India', means the negation of a Power Elite and Political Cabal manipulating the nation's affairs, crushing the personality of sub-nationalities and the people at the level of the masses, then Indian democracy must take on a decentralised profile. If Delhi decides matters which effects vitally without consultation and acceptance by the State units, tension and violation of representative federalism are inevitable. Therefore when we consider enforcement of GATT provisions which operates contrary to the will, wishes and interests of the States, federalism, a basic feature of the Constitution, stands flouted and sours into unconstitutional inconsequence.

Written Constitutions like ours and of the U.S. have a remarkable feature, i.e. Review by the Judiciary as a basic structure of the Constitution. Judicial Review, says K. Ramaswamy J. "is a basic feature of the Constitution . . . This Court as final arbiter in interpreting the Constitution declares what the law is". So,

Marrakesh is not the last word on the Final Act because the Court can pronounce whether it binds India or not.

GATT rules cannot, by any stretch of imagination, supplant or supplement or even dilute the hard constitutional law of India. The Supreme Court is supreme and its writ cannot be whittled down by Agreements entered into by the Union Government with other countries. In *Mrs. Ramaswamy* (AIR 1992 SC 2219) the Supreme Court ruled that even after both Houses of Parliament had passed an impeachment motion, the Court had power to examine the legality of the impeachment. Even when the President of India, in exercise of his extra-ordinary power, dissolves State Legislatures and Governments it was open to the Court, with due restraint, to scrutinise the validity of the Rashtrapathi's action. The *State of Rajasthan*, reinforced by *S.R. Bommai* (J.T. 1994 (2) SC. 215 at Page 379-380), is conclusive. A passage from the earlier ruling is apt:

". . . So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. *Indeed it would be its Constitutional obligation to do so ..... this Court is the ultimate interpreter of the Constitution* and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of law . . ."

Assuming that the Final Act is signed by a Minister on behalf of the Union of India, what is its effect if the Court holds the action as in transgression of the powers under the Constitution? This issue is of supreme importance, particularly because many States in India may feel aggrieved that their domain has been encroached upon without even meaningful consultation. It is possible for the Union to take the view that Article 73 read with Article 253 vests a plenary power in the Union, even without consultation with or concurrence of the States. On the contrary, the States may read a limitation on Entry 14, List I, and Art. 253 as being subject to the overall scheme of Federalism with a legal

right for the States to express their consent or dissent. One question which thus arises is as to whether Art. 253 of the Constitution permits the Union Government to implement international treaties without complying with Art. 249 or Art. 252 of the Constitution or when there is no state of emergency as mentioned in Art. 250. Tentatively, federalism implies constitutional limitations, not blanket power.

What else are basic and therefore beyond the bounds of breach by any authority in the country? The Constitution is supreme and, under it, Parliament controls the Council of Ministers who are functionally responsible to the House. But the Cabinet is not benumbed. It can act on its own initiative, formulate policies, negotiate treaties and govern the country, always remembering its subserviance to the omnipotence and omnipresence of Parliament.

The treaty power of the Central Government must submit to this limitation lest Parliament be reduced to a powerless talking shop by a shrewd Cabinet which presents a fait accompli to the House which may bark but not bite. The Marrakesh signature on the Final Act is not the end. Many laws and amendments may be necessary, tuned to the GATT wavelength. Parliament may or may not say *amen* to the changes. If it does, the Court's review power may be invoked. President or Prime Minister, be you ever so high, the Constitution is above you and the Constitution is what the Judges say it is. GATT may be guillotined by the highest Court within their jurisdiction if the basic structure is betrayed or contra-constitutional provisions are found in the treaty. Such is our jurisprudence.

Federalism is a basic feature, as recently reiterated in the *S.R. Bommai* ruling by Ramaswamy J. Jeevan Reddy. J. echoed the same view: 'the Constitution of India has created a federation but with a bias in favour of the Centre. *Within the sphere allotted to the States, they are supreme.*'

The noble Preamble has itself been recognised as a constellation of values constituting the basic structure of the Constitution. "?The Preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, unity and integrity of the nation, secularism, social justice and judicial review are

basic features of the Constitution". Secularism, on which the Judges founded the *Bommai decision*, has been held to be a basic feature. K. Ramaswamy J., in the above case, held that "*The preamble of the Constitution is an integral part of the Constitution.* Democratic form of Government, *federal structure* unity and integrity of the nation, secularism, *socialism, social justice* and *judicial review* are basic features of the Constitution." The *creme de la creme* of the Constitution, in its political vision, economic mission and developmental action, is what the Preamble, in condensed excellence, spells out. If the Final Act is discordant it ceases to bind.

In D.S. Nakara (AIR 1983 SC 130) the Preamble was used to strengthen the conclusion that a *socialist goal* was included in the founding creed of the Constitution. A unanimous bench there ruled:

"33. Recall at this stage the Preamble, the floodlight illuminating the path to be pursued by the state to set up a Sovereign Socialist Secular Democratic Republic. Expression 'socialist' was intentionally introduced in the Preamble by the Constitution (Forty-Second Amendment) Act, 1976. In the Objects and Reasons for amendment amongst other things, ushering in of socio-economic revolution was promised. The clarion call may be extracted:

"The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the active attention of Government and the public for some time . . ."

What does a Socialist Republic imply? In Indian conditions and Constitutional perspective, it is inscribed in Art. 38:

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

The basic framework of socialism, Desai J. observed in *Nakara*, is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This, amongst others, on the economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism leaning heavily towards Gandhian socialism.

Chinnappa Reddy J. in *Randhir Singh* (1982 SC 879) observed:

"Now thanks to the rising social and political consciousness and the expectations roused as a consequence and the forward looking posture of this Court, the under-privileged also are clamouring for their rights and are seeking the intervention of the Court with touching faith and confidence in the Court. The Judges of the Court have a duty to redeem their constitutional oath and do justice no less to the pavement dweller than to the guest of the Five Star Hotel."

As recently as 1992 the Court, in *Mohini Jain* (AIR 1992 SC 1858), laid stress on this facet:

"8. The preamble promises to secure justice "social, economic and political" for the citizens. A peculiar feature of the Indian Constitution is that it combines social and economic rights along with political and justiciable legal rights. The preamble embodies the goal which the State has to achieve in order to establish social justice and to make the masses free in the positive sense. The securing of social justice has been specifically enjoined an object of the State under Art. 38 of the Constitution."

"But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it."

The foremost human right, the right to life, is to fundamental to be invaded by the Executive or by a Treaty signed by the Executive. Constitutional inviability defends the life of the feeblest. What is life?

"Life is not mere living but living in health. Health is not the absence of illness but a glowing vitality—the feeling of wholeness with a capacity for continuous intellectual an spiritual growth. Physical, social, spiritual and psychological well-being are intrinsically interwoven into the fabric of life. According to Indian philosophy that which is born must die. Death is the only certain thing in life."

30. May it be said that in C.E.S.C. Ltd. v. Subhash Chandra Bose it has been opined by Ramaswamy, J. (who is, of course, a minority Judge) that physical and mental health have to be treated

as integral part of right to life, because without good health the civil and political rights assured by our Constitution cannot be enjoyed."[1]

The Indian Constitution, though on special situations operates in a unitary fashion is essentially a dual polity as Dr. Ambedkar mentioned in the Constituent Assembly. He pointed out:

> "A federal constitution is marked (1) by the existence of a central polity and subsidiary polities side by side, and (2) by each being sovereign in the field assigned to it. In other words, Federation means the establishment of a dual polity. The Draft Constitution is a federal constitution inasmuch as it establishes what may be called a dual polity. This dual polity under the proposed Constitution will consist of the Union at the Centre and the States at the periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution. This dual polity resembles the American Constitution. The American polity is also a dual polity, one of it is known as the Federal Government and the other States which correspond respectively to the Union Government and the State Governments of the Draft Constitution. Under the American Constitution the Federal Government is not a mere league of the States nor are the States administrative units or agencies of the Federal Government. In the same way the Indian Constitution proposed in the Draft Constitution is not a league of States nor are the States administrative units or agencies of the Union Government." [B. SHIVA RAO, Framing of India's Constitution Vol. IV Page 422]

This federal fundamental is a basic structure of the Constitution, which means that constitutional morality and law demand recognition of the non-negotiable reality of statehood with autonomy, the inevitable inference being that when the Union does an act trenching upon the provincial sphere, it has to be with the concurrence of the States, otherwise federalism becomes a chimera, a teasing illusion.

Another point Dr. Ambedkar stated in the Constituent Assembly was that economic democracy was the country's aspiration and not "merely a parliamentary form of government to be instituted

1 [(1994) 3 SCC 394 at Page 409]

through the various mechanisms provided in the Constitution, without any direction as to what our economic ideal, as to what our social order ought to be." Now that the Final Act is becoming a binding series of agreements we have to ask ourselves: Was Marrakesh an exercise in futility? Having regard to the wide range of the Final Act and the profound implications for the interests of the signatory countries, and in the light of the Constitutional fundamentals, it is necessary to scan the GATT anatomy.

ON JUDICIAL REVIEW

Questions of Constitutionality loom large over the legality of India's negotiations of the Uruguay Round because of the well founded allegation that there was a failure on the part of the designated constitutional institutions to consider the full implications of that treaty and or impact on governance, the basic structure of the Constitution and the fundamental rights of the people. Despite persistent demands both within and outside Parliament that due and considered attention be given to the issues arising out of Uruguay Round negotiations, Parliament failed to apply its mind to these issues in any great measure. Given the totality of the circumstances, it is difficult to resist the conclusion that there was a deliberate attempt to ensure that these issues were not properly debated. Even at the very early stages, when India was placed under the pressure of retaliation by America which invoked its Super and Special 301 provisions to induce India to give up its resistance (if any) to the new round of GATT negotiations, the answers given to Parliament were falsely reassuring and misleading. When—in the spring of 1989—the catchment of negotiations were extended beyond trade *strictu sensu*, this was done behind the back of Parliament. If the Government was forced to publish some kind of consultative document in 1992, it was only because of public pressure. The report of the deliberations of the Committee appointed to examine contentious issues was never published. We do not need to elaborate these failures which are tantamount to stifling democracy. The lack of

candour and consultation is well known and well documented (see R. Dhavan: *Democracy and* GATT Negotiations—*An Indian Case Study* of National Working Group on Patent Laws, 1993). Eventually, Parliament was faced with a *fait accompli.* Right till the end there was no major debate on the issues, with the Prime Minister making it clear that while a debate would take place at some point in time, this would not deter or restrain the Government from going ahead and completing the task that it begun and taking it to its logical limits.

It was under these circumstances that several writ petitions were filed in various High Courts and the Supreme Court which were either dismissed, permitted to be withdrawn or kept in abeyance. Meanwhile, three States—namely the States of Tamil Nadu, Orissa and Rajasthan—raised a federal dispute under Article 131 of the Constitution by filing 'suits' against the Union of India, *inter alia,* alleging that the 'Final Act' would have the inevitable effect of subverting Indian federalism; and, that such multilateral treaties, which contain their own mechanisms to secure international enforcement, cannot be left to be negotiated by the *ipse dixit* of the Union Government under circumstances where neither the people nor the States which form the Union are consulted. It is necessary to recall that the Uruguay Round negotiations represented an extremely wide range of subject areas including agriculture and medicine which fall within the exclusive powers allocated to the states under the Indian Constitution.

The exact fate of these inter-state disputes is not known. At first, the Union of India played cat and mouse by not replying to the notices issued to it. In danger of the suits being decreed by default, the Union responded to orders in the Orissa suit by filing a response. No further action appears to have been taken. The States in question decided not to pursue them. Significantly, the suits were filed by governments in which 'opposition' parties were in power. But, two of the opposition governments whose Chief Ministers had protested about GATT—namely the States of West Bengal and Bihar—chose not to file a suit. The opposition government in Orissa fell after an electoral battle in 1994-95. The other two oppositions governments (namely those of Tamil Nadu and Rajasthan) seem to have forsaken the rigour of their

initial decision to pursue the case in the Supreme Court.

This precipitates an issue which must be regarded as one of fundamental importance for Indian democracy. In a situation such as this—where official parliamentary majorities have intimidated that pivotal body from examining the issues, where the States have not pursued their causes of action with rigour and where public interest petitions have not found the favour of judicial discretion—where does the citizen turn to for constitutional redress ? It is not as if Parliament and the court do not have the power to examine these issues. For different reasons, they have chosen not to. Whatever the reason, the citizens' quest for democratic justice continues and seeks to find at least the satisfaction of due consideration in this forum.

Before we proceed further, it is necessary to make a distinction between 'constitutionality' and 'justiciability'. 'Constitutionality' in its widest connotations represents that vast array of discourse which determines what is constitutionally *proper* irrespective of whether it is enforceable through courts of law or not. Constitutional norms in their widest sense represent traditions which are necessary for the working of constitutional institutions in a just and proper manner. For example, there can be little doubt that Parliament is under a duty to enact legislation with due care. It may not do so. However, this constitutional obligation may not be enforceable through a court of law under our parliamentary system, the executive accountable to the legislature Part of this accountability must, perforce, include obtaining parliamentary approval for a wide ranging treaty which will alter the balance of power and responsibility under the Constitution. The failure to win such approval—or even to attempt to procure it—suggests a failure of constitutional obligations. The courts may refuse to interfere. They may have good constitutional reasons to do so. But, such a refusal is no reason to deny that such constitutional requirements are not mere expectations but norms on which the very working of the constitutional system depends. 'Justiciability' is confined to such norms which the courts feel that they have the power—and are willing—to enforce.

We have no doubt that the manner in which the Uruguay Round was negotiated was certainly unconstitutional—using the

test of constitutionality in the wider prescriptive sense of including all norms which are considered necessary and proper for ensuring that the Constitution is run in a just, efficient and democratic manner. This is self evident from the facts—the secrecy in which the negotiations were conducted, the failure to consult the people and the States, the failure to account to Parliament, and the overall failure to ensure proper democratic accountability.

In the various submissions, we have also been asked to consider the failure of constitutionality in the narrow sense of justiciability. In other words, have been invited to consider whether the issues that have arisen are of a kind that they violate justiciable norms. In order to do this, we have to examine whether there is a violation of constitutionality in the wider sense. To that extent, an overall consideration of the issue of constitutionality is imperative.

ON THE TREATY MAKING POWER

We are concerned here with the treaty making power of the Union Government.

The executive power of the Union Government to enter into treaties flows from Article 73(1) of the Constitution which reads as under:

"Extent of executive power of the Union—Subject to the provisions of this Constitution, the executive power of the Union shall extend

(a) to the matters with respect to which Parliament has power to make laws;

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws."

Under Article 246 of the Constitution, the matters with respect to which Parliament has power to make laws are contained in

List I of the Seventh Schedule. It is relevant to take note of the following entries in List I:

E. 13 Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

E. 14 Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

Accordingly, the power of the Union Executive to negotiate and enter into treaties is co-extensive with and flows from the legislative power qua treaty making. Under the scheme of Article 73 read with Entries 13 and 14 of List I of the Seventh Schedule, there is no self-standing executive treaty making power. Instead, it is derivative from the legislative power qua international treaties. The question then arises as to whether Parliament has enacted legislation setting the parameters of the executive treaty making power and subjecting it to democratic norms of accountability and transparency. In the context of the Uruguay Round Negotiations, we note that no such legislation has been passed.

The executive power conferred under Article 73 of the Constitution to enter into treaties must also be read along with Article 253 of the Constitution on implementation of treaties which reads as follows:

> "Legislation for giving effect to international agreements—Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

The effect of Article 253 is clearly to allow Parliament to make laws implementing a treaty notwithstanding the fact that the subject matter of the treaty is contained in List II of the Seventh Schedule. We note that Article 253 confers Parliament with the extraordinary power to collapse the federal structure of the Republic for the purposes of treaty implementation.

Read literally, the treaty making power is wide in its amplitude and appears free from any express conditionalities that govern

its exercise. But such a reading of the power is inevitably misleading. Suppose, the treaty making power results in a surrender of India's sovereignty, would not such an exercise of executive power (of which the treaty making power is a part) be regarded as unconstitutional. No doubt, a treaty—by itself—would not be enforceable in Indian courts. Its provisions would not be the law of the land unless they were specifically enacted as part of Indian law by Parliament. But, that would not conclude constitutional misgivings about the treaty which may set up a powerful external enforcement of the treaty (as has been done in the case of the Uruguay Round) so that India and its people would feel the effect of non-compliance with the terms of the treaty. The treaty making power must be deemed to be subject to certain express and implied limitations.

The limitations on the exercise of the Treaty making power flow from certain principles which are fundamental to constitutional governance in India. The *first* is the general principle of accountability which requires government to account to the people for every exercise of power through the aegis of institutions set up by and under the Constitution. Such accountability may be through the law which lays down norms which discipline and govern the exercise of the power. Where no such law exists—and none exists to discipline the exercise of the treaty making power—the government is not free to do what it likes. Where the government chooses to proceed without serious recourse to any form of accountability, other institutions of governance cannot stand idly by. Where Parliament is rendered powerless, other institutions must secure this accountability to such measure as may be deemed necessary. Where something is done in secret, simply breaking the veil of secrecy may be enough. It all depends on the facts and circumstances. The *second* principle which is fundamental to the rule of law is that no person's rights can be altered without reference to 'law'. If the executive simply interfere with the exercise of rights or alter them in any way other than *de minimus* infringement, this would be constitutionally improper and call for the interdiction of judicial processes. The *third* set of constraints flow from the basic structure of the Constitution. Although the basic structure doctrine was first enunciated to

contain an over-extensive use of the power to amend the Constitution, the principles underlying the basic structure are also crucial aids to interpretation and factors to be borne in mind when considering the exercise of executive power.

The Constitution makers intended the government to be possessed of an executive power which is wider than the narrower duty to give effect to legislation (see *Ram Jawayya Kapur* v. *Union of India AIR 1955 SC 549*). But, in the exercise of this wider power, the rights of citizens cannot be taken away without specific legislative sanction and authority (*Bijoe Emmanuel* AIR 1987 SC 748). This rule is fundamental and a necessary adjunct to the recognition of a wide executive power. Equally, in normal circumstances, it is somewhat sanguinely assumed that all exercises of executive power would be consistent in a manner consistent with the principles of the basic structure of the Constitution. But, normal times tread unwarily into abnormality. That is why the touchstone of the basic structure has been inducted to discipline the exercise of even those special exercises of sovereign power such as the imposition of President's Rule and the like (see *S.R. Bommai* (1994) 3 SCC 1; and also *M.Ishmail Faruqui* (1994) 6 SCC 360). The older view that exercises of executive power are immune from judicial review has now correctly been abandoned (see *Council for Civil Service Unions* v. *Minister for Civil Service* (1984) 3 All E.R. 935). While it is true that a word of caution has been sounded on the judiciary viewing questions of foreign policy (see *Council for Civil Service* (supra) approved in *S.R. Bommai* (*supra* at pr. 373)), this word of caution cannot be treated as an *ex cathedra* prohibition. There are situations where the rights of the citizens may be affected or where the very basic principles of constitutional governance are put in jeopardy. In such situations, judicial review will lie for it is the judiciary alone which can interpret the limits on the constitutional exercise of power by other constitutional functionaries within the limits of forbearance demanded by constitutional comity amongst institutions.

Similarly, in *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 at pr. 200-201, the Court took the view that the "action of the President under Article 356 is a constitutional function and the

same is subject to judicial review." The Supreme Court has therefore taken the view that where it is asked to determine the nature, scope and power of the Executive under a provision of the Constitution, it was irrelevant that the nature of the Executive's decision was wrapped up in the political thicket. The Supreme Court in *S.R. Bommai* (1994) 3 SCC 1 at pr. 200-201, observed: "The question relating to the extents, scope and power of the President under Article 356 though wrapped up with political thicket, per se it does not get immunity from judicial review." And at para 258, the Court observed, " . . . pure legal questions camouflaged by the political questions are always justiciable."

The second consideration regarding judicial review in this case is whether judicially manageable norms can be applied to evaluate the decision of the Union Executive to sign the Final Act. In *S.R. Bommai v. Union of India*, the Supreme Court took the view that judicially manageable standards were available to evaluate the validity of the decision of the President in issuing a Proclamation of Emergency under Article 356 of the Constitution. According to the Supreme Court, the President's power to issue a Proclamation was a conditional power. In exercise of judicial review, the court is entitled to examine whether the conditions have been satisfied or not.

In *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 at paras 74 and 60, (Per Sawant and Kuldip Singh JJ), the Court observed that,

> " . . . the exercise of power by the President under Article 356(1) to issue Proclamation is subject to judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution."

In *S.R. Bommai*, the President's decision was held to be judicially reviewable to the extent of examining whether the Proclamation was issued on the basis of any material at all, whether the material was relevant or whether the Final Act was signed in the mala fide exercise of power.

Similarly, in the case at hand, it must first be ascertained whether the Union Executive complied with the constitutional limitations on the treaty making power. We begin with the assumption that the treaty making power under the Constitution is not untrammelled. Certainly, the Executive is not totally unrestrained from entering into a treaty which makes India subordinate to another nation, relinquishes its territory or makes other inroads into its sovereignty. The power of the Executive in entering into a treaty under Article 73 has the capacity to emasculate basic features of the Constitution. The Court accordingly has the power, indeed has a duty, to exercise its power of judicial review at least to the extent of examining whether the Executive's decision to sign a treaty comports with the limitations on the treaty making power provided either explicitly or by necessary implication in the Constitution. Ascertaining the Constitutional limitations on the treaty making power and determining whether the Executive acted within these parameters is undisputably a judicially discoverable and manageable task.

The Supreme Court has the constitutional duty and responsibility, since judicial review has been entrusted to it as a constituent power to review the acts done by the executive or legislature under the Constitution within the applicable parameters. The Supreme Court has the duty and responsibility to ascertain the extent and limits of the power of the executive and the legislature.

The exercise of power by the Executive in entering into a treaty under Article 73 is subject to judicial review at least to the extent of examining whether the Executive acted with the Constitutional parameters which circumscribe the treaty making power. These parameters will be defined and examined hereafter.

One of the questions raised is whether there are judicially manageable standards to review the exercise of executive power in so far as it relates to Treaty making. No doubt, judges are not expected to examine the desirability of entering into a particular treaty obligation. That is another matter altogether. But, if the direct and inevitable effect of a treaty is that it will infringe fundamental rights, the judiciary has a constitutional obligation to interfere. Again, if the treaty making power subverts the principle of accountability (which is in many ways the cornerstone of

democratic governance) to a point that adherence to such principles has become a mere sham and their observance has become illusory, courts will pass necessary orders to restore the norms of accountability. Nor can the judiciary stand by to witness a treaty simply riding rough shod over the very basic structure of the Constitution including democracy, sovereignty and social justice.

While it is arguable that since treaties do not give rise to enforceable obligations within the Indian legal system, there is no room for judicial interference until legislation is passed; and, further-flowing from this argument—since Parliament will assess the situation when enacting implementing statutes, there is no scope for the judiciary to intervene. This argument proceeds on the fallacious assumption that treaties do not pose a danger to the constitutional system and fundamental rights until they are given shape in the form of legislation. Treaties are solemn obligations. Within their own legal context—and the domain of international law—they are legal and binding on the Union of India and States. They cannot be resiled from, even if legislation implementing them is not passed. The consequences of treaty violation are in the realm of international law. Particular treaties may contain figorous forms of enforcement. They may prove to be self fulfilling (even though they are not self executing and applicable in the domestic legal system). Treaty violations may bring reparations and trade distortions. In this day and age where the international order is increasingly regulated by multi-lateral treaties, there is little protection from the falsely comforting thought that treaties do not pose a threat since Parliament has to pass implementing legislation to make the treaty enforceable within the Indian legal system. Each situation has to be dealt with on its own. There can be no hard and fast rule that the treaty making power can never be subject to judicial review. There may be something in the nature of a treaty, something about the manner in which it is negotiated, something about its inevitable consequences and something about its impact on governance that may call for interference. At one level, the judicial power may simply ordain lifting secrecy or providing for consultation. At another level, it may be legitimate to ask whether the treaty

offends fundamental rights or puts at risk the very principles of governance on which the Constitution rests. These are all judicially manageable standards.

The Uruguay Round is one of the most important treaties signed by the Indian government since independence. It raises very fundamental questions about Indian federalism, the welfare State, fundamental rights and the functioning of Indian democracy. Let us examine the basic structure questions in so far as they affect federalism.

ON FEDERALISM

In respect of the basic structure of the Constitution, the first question to be considered is whether the Government of India, by becoming a signatory to the Final Act, abrogated the Federal Principle as incorporated in the Indian Constitution and, thereby, acted unconstitutionally.

By the deliberate choice of the people of India, the Constitution of India is, conceptually, federal in nature, but with a strong bias in favour of the Centre in the matter of distribution of powers, their content and their felicitous exercise. It possesses the one essential and fundamental characteristic of a Federal Constitution—the sharing of powers by the nation-State and its constituent units, each exercising "within a sphere, coordinate and independent" powers.

Keeping this basic Federal Principle in view, the Indian Constitution too, like all other Federal Constitutions elsewhere in the world, has developed its own individual characteristics tailored to the genius and the requirements of the Indian people, consisting of a multi-racial, multi-religious, multi-lingual, multi-cultural and multi-dimensional blend. Some of the features of the Indian Constitution may even appear, on first impression, to run against the Federal Principle, leading some eminent writers and Judges to attach various labels to the Indian Constitution, such as, "Quasi-Federal," "Organic," "Co-operative" etc. H.M. Seervai in his classic work on the Indian Constitution has dealt with the subject at great length and pointed out how those features

which seemingly appear to detract from the Federal Principle are not really inconsistent with that Principle. Mr. H.M. Seervai's views are quoted with approval by Justice Sawant in *S.R. Bommai v. Union of India*, (1994) 3 SCC 1. Justice Sawant and Justice B.P. Jeevan Reddy have also pointed out the futility of trying to find a label for the Federalism of the Indian Constitution when we should be more concerned with the specific provisions of the Constitution.

Broadly, in the case of *Kesavananda v. State of Kerala*, AIR 1973 SC 1461, the Supreme Court has held that the Indian Constitution is Federal in nature and that Federalism is a basic feature of the Constitution. It was said, "The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republican and Democratic forms of Government;

(3) Secular character of the Constitution;

(4) Separation of power between the Legislature and the Executive and Judiciary;

(5) *Federal Character of the Constitution.*"

In *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, discussing the impact of Article 356 on Federalism, Justice Sawant who spoke for himself and Justice Kuldip Singh observed,

> "Democracy and Federalism are essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must, therefore, help to preserve and not subvert their fabric. The power vested de jure in the President and de facto in the Council of Ministers has all the latent capacity to emasculate the two basic features of the Constitution and hence it is necessary to scrutinize the material on the basis of which the advice is given and the President forms his satisfaction more closely and circumspectly."

The Learned Judges proceeded to quote Mr. Seervai and then observed,

> "The above discussion shows that the States have an independent Constitutional existence and they have as important a role to play in the political, social, educational and the cultural life of the people as the Union. They are neither satellites nor agents of the Centre . . . The

people in every State desire to fulfill their own aspirations through self governance within the framework of the Constitution. Hence, interference with the self governance also amounts to the betrayal of the people and unwarranted interference . . . Whatever the nature of Federalism, the fact remains that, as stated above, as per the provisions of the Constitution, every State is a constituent political unit and has to have an exclusive Executive and Legislature elected and constituted by the same process as the Union Government. Thus the Federal Principle, social pluralism and pluralist democracy . . . for the basic structure of our Constitution."

Justice B.P. Jeevan Reddy speaking for himself and Justice S.C. Agarwal observed,

"The fact that under the scheme of our Constitution greater power is conferred upon the Centre vis-a-vis the States does not mean that the States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the states . . . All this must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the Federalism in the Indian Constitution is not a matter of administrative convenience but one of principle—the outcome of our own historical process and a recognition of the ground realities."

Justice Ratnavelu Pandian accepted and adopted the views of Justices Jeevan Reddy and Sawant. Thus, the Learned Judges laid down that Federalism is part of the basic structure of the Indian Constitution and that it is not to be abridged, mutilated or amputated. They also laid down a rule of interpretation that provisions of the Constitution should be interpreted so as not to interfere with the principle of Federalism and so as not to encroach upon the powers of the State under the Constitution. The Learned Judges showing an awareness of the process of history were apprehensive that disastrous results may follow otherwise, dealing death blows to democracy and paving the way for authoritarianism. They are conscious that power tends not to devolve but to

concentrate and consolidate. Bearing in mind the emphatic assertion of the Supreme Court that Federalism is a basic feature of the Indian Constitution and the rule of interpretation laid down by Justices P.B. Sawant, Kuldip Singh, Jeevan Reddy, S.C. Agarwal and Ratnavelu Pandian, we may now proceed to examine the relevant provisions of our Constitution.

Articles 245, 246 and 248 provide that,

(i) In respect of any of the matters enumerated in List I of the Seventh Schedule and in respect of any matter not enumerated in Lists II and III, Parliament has exclusive power to make laws for the whole or any part of the territory of India.

(ii) In respect of any of the matters enumerated in List II, the Legislature of any State has exclusive power to make laws for the whole or any part of that State and

(iii) In respect of any of the matters enumerated in List III, Parliament and the Legislature of any State shall have power to make laws for the whole or any part of India or the whole or any part of the State respectively. The power of the Legislature of the State is subject to the power of Parliament.

Article 249 provides that if the Rajya Sabha by a two-thirds majority of the members present and voting declares the necessity or the expediency of Parliament making laws in respect of any matter enumerated in List II and specified in the Resolution, Parliament may make laws with respect to that matter for the whole or any part of India. The resolution may be in force for a specified period not exceeding one year or may be extended from time to time for a further period not exceeding one year. Such law shall cease to be in force six months after the resolution ceases to be in force to the extent Parliament is not otherwise competent to make the law.

Article 250 deals with the power of Parliament to legislate with respect to any matter in List II if a proclamation of emergency is in operation. Article 252 deals with the power of Parliament to legislate for two or more states on the request of the legislatures of those states and enables any other state to adopt such legislation.

Article 253 enables Parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or

any decision made at any international conference, association or other body. Articles 251 and 254 resolve inconsistencies between laws made by Parliament and laws made by the legislatures of States.

While the distribution of Legislative powers between Parliament and the Legislatures of the States is arranged in this fashion, Executive powers are dealt with by Articles 53, 73, 151 and 162. Article 53 stipulates that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through Officers subordinate to him in accordance with the Constitution. Similarly, Article 154 stipulates that the Executive power of the State shall be vested in the Governor and shall be exercised by him directly or through officers subordinate to him in accordance with the Constitution.

Article 73 provides that the executive power of the Union shall extend.

(a) to the matters with respect to which Parliament has the power to make laws; and
(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

Article 162, in turn, provides that the executive power of the State shall extend to the matters with respect to which the legislature of the state has power to make laws.

It is now necessary to glance at some of the entries in the Seventh Schedule. The following entries in List II are concerned with subjects likely to be affected by the Final Act.

List II

E. 6 Public Health and Sanitation, Hospitals and Dispensaries."
E. 8 "Intoxicating liquors that is to say, production, manufacture, transport, purchase and sale of intoxicating liquors."
E. 13 "Communications, that is to say Roads, bridges, ferries and other means of Communication not specified in List I . . ."
E. 14 "Agriculture, including Agricultural Education and Research, Protection against Pests and prevention of plant diseases."

E. 15 "Preservation, protection and improvement of stock and prevention of animal diseases, veterinary training and practice."

E. 18 "Land, that is to say, rights in or over land . . . transfer and alienation of agricultural land, land improvement and agricultural loans . . ."

E. 21 "Fisheries."

E. 24 Industries, subject to the Provisions of Entries 7 and 52 of List II.

E. 27 Production, supply and distribution of goods, subject to the provisions of Entry 33 of List III.

These are a few of the entries in List II (State List) which are affected or are likely to be affected by the Final Act. This is not an exhaustive list of all subjects in List II which are likely to be affected by the Final Act. Apart from the entries in List II there are also entries in List III (Concurrent List). Subjects like "drugs and poisons" (Entry 19), "economic and social planning" (Entry 20) etc., will also be affected by the Final Act. The question is whether the Union Government has the power to unilaterally make India a party to the Final Act without the concurrence of the States notwithstanding that the Final Act covers several subjects over which the States have exclusive jurisdiction.

We have seen that the legislative power to enter into International Treaties or agreements is with Parliament under entries 13 and 14 of List I of the Seventh Schedule. By virtue of Article 73 the executive power of the Union extends to entering into such treaties or agreements and under Article 53 such executive power vests in the President and has to be exercised by him, in accordance with the Constitution, either directly or through officers subordinate to him. Under Articles 245, 246 and 248, read together, Parliament has no power to make law in respect of matters enumerated in List II, except as provided in Articles 249, 250 and 252, with none of which we are now concerned. Consequently, the Executive Power of the Union does not extend to any of the matters in List II since such executive power of the Union is co-extensive with the legislative power of Parliament (Article 73a) and does not go beyond such power. Since the Executive power of the Union has to be exercised by the President,

in accordance with the Constitution, it follows that the President, exercising the executive power of the Union to enter into International Treaties or agreements has to act in accordance with the Constitution and such power cannot be exercised so as to impinge upon the power of the States. Any treaty or agreement entered into by the President encroaching upon the powers of the State would be a violation of the Federal principle and contrary to the basic structure of the Constitution.

It is true that Article 253 enables Parliament to make laws for implementing any treaty agreement or convention with any other country or countries or any decision made at international conferences, associations or other bodies and Article 73(1)(b) provides for the executive power of the Union in respect of the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

Articles 253 and 73(1)(b) both deal with an ex-post facto situation, that is, a consequential situation arising out of an international treaty, agreement or convention already entered into. They confer the necessary legislative and executive power to implement such treaty, agreement etc. Obviously such treaty, agreement etc. may not be a treaty, agreement etc. however made but must be one made according to the Constitution and not contrary to the Constitution. For example, the Union Government cannot barter away the sovereignty of the people of India by entering into a treaty making India a vassal of another country and then invoke Articles 253 and 73(1)(b) to implement the treaty. Such a treaty would be void ab initio being repugnant to the basic features of the Constitution, namely, the sovereignty of the people.

Thus, an international treaty or agreement entered into by the Union Government in exercise of its executive power, without the concurrence of the States, with respect to matters covered by Entries in List II of the Seventh Schedule, offends the Indian Constitutional Federalism, a basic feature of the Constitution of India and is therefore void ab initio. The Final Act is one of that nature. This our prima facie opinion on the question whether the Final Act is repugnant to the Federal nature of the Constitution and we strongly urge the Union Government to do nothing which abridges that principle.

ON FUNDAMENTAL RIGHTS

The next question is whether the Final Act violates the fundamental rights protected under the Constitution. A penumbra of fundamental rights are guaranteed under Article 21 of the Constitution. Article 21 protects the right to life and personal liberty of all persons. The Supreme Court has held that the right to life enshrined in Article 21 includes a right to live with human dignity and includes all those aspects of life which go to make a man's life meaningful, complete and worth living. *Olga Tellis v. Bombay Corpn.*, AIR 1986 SC 180; *Maneka v. Union of India*, AIR 1978 SC 597. The right to life also includes the right to food, clothing, and maintenance and improvement of public health. The Supreme Court in *Bandhua Mukti Morcha v. Union of India*, [1984] 3 SCC 161 aptly observed,

> "This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief."

The inclusion of the right to health as part of the right to life enshrined in Article 21 was reiterated by the Supreme Court in *Vincent v. Union of India*, (1987) 2 SCR 468 at 478:

> "As pointed out by us, maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged."

It is settled law that in adjudging the constitutionality of statutory provisions on the touchstone of fundamental rights, the test is whether the provision will have a "direct and inevitable effect" on a fundamental right. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248. Further, fundamental rights must be "directly and

Recently, Indian pharmaceutical firms, using different processes, manufactured and sold the same medicine at Rs. 8/- per pill. The same medicine is sold in France at nearly Rs. 400 per pill (Rs. 15860/- (Fr. 3172) for 40 tablets). The Union Government claims that price controls will prevent drug prices from escalating. However, this promise is undermined by the new drug policy announced in September 1994 in which the number of drugs under price control has been reduced from 142 to 73. Moreover how price control would be possible on imports.

Furthermore, companies will not be obliged to work the patent so that it may be used as an important monopoly preventing anyone else from manufacturing the invention in India. This will take India back to the situation prevailing under the colonial Patents & Designs Act, 1911 when even essential life saving drugs were not available in India. Thus, the TRIPS Agreement will have a direct and inevitable affect on the affordability and availability of medicines in India.

In view of the fact that the TRIPS Agreement will require repeal of the provisions of the Patents Act, 1970 which made medicines affordable and available in India, we are led to the conclusion that the TRIPS Agreement will have a direct and inevitable effect on the maintenance and improvement of public health and the accessibility of the common man to medicines which are included in the right to life enshrined in Article 21 of the Constitution.

In addition to the TRIPS Agreement, we must also examine the impact of the Agreement on Agriculture on the right to food aspect of the right to life. As discussed in Chapter 5, *supra*, the Agreement on Agriculture governs domestic support provided to farmers, market access available to foreign producers and export promotion. First, the Agriculture Agreement requires India to reduce domestic support for farmers by the levels specified in the Schedule of Commitments and allows only a de minimus support of 10%. This will necessarily prevent the Indian Government from providing the necessary product-specific and general support to farmers to compensate beyond a specified level for shortages or overabundance caused by climatic variation or fluctuations in market prices due to other factors. This loss of

support will reduce the ability of farmers to produce an adequate supply of food at reasonable prices thereby affecting the right to food.

It appears, however, that the Agriculture Agreement has a disparate impact on rich and poor countries. This is due to the exemption of direct payments to farmers not to produce from any reduction requirements. Accordingly, the rich industrialized countries like the United States will continue to subsidize farmers by giving them the direct payments which are exempt from any reduction obligations and which essentially are cash handouts contingent on making adjustments in production. At the same time, the Indian Government will be constrained in providing necessary support to farmers.

The Agriculture Agreements will affect India's domestic food security and food aid programmes by subjecting them to external scrutiny as to whether the operation of public stock holding programmes is transparent and follows officially published objective criteria. Although a developing country may acquire and release foodstuffs at administered prices, the difference between the international market price and the administered price will be included in the calculation of the Aggregate Measurement of Support (AMS) (Annex 2, para 3, footnote 5). Therefore, the public stockholding system must be cut back if the AMS exceeds the 10% de minimus level.

Domestic food aid programme, namely, the Public Distribution System of Foodgrains (PDS) will also be subject to scrutiny as to whether eligibility is subject to clearly defined criteria relating to nutritional objectives. In addition, good purchases by the Government must be made at current market prices, thereby preventing the Government from subsidizing farmers.

The Agriculture Agreement further requires India to provide a minimum market access to foreign producers. In order to maintain any non-tariff barriers, that is, quantitative restrictions such as quotas, licensing requirements etc., India must guarantee market access to foreign producers. Market access of 4% of the average of 1986-88 domestic consumption increased by 0.8% every year of the implementation period (1995-2001 for developed countries and 1995-2005 for developing countries) should be

provided. At the expiry of the implementation period, India must provide market access equivalent to 8% of 1986-88 domestic consumption. In addition, it must reduce tariffs by 15% over the implementation period. In the case of a primary agricultural products that is a predominant staple in the traditional diet of a developing country, market access of 1% of the average 1986-88 domestic consumption from 1995 increased in equal annual increments up to 2% of domestic consumption in 2000 must be provided. From 2001 to 2005, the market access must increase in equal increments from 2% of the average 1986-88 domestic consumption to 4%.

The foregoing market access requirements will adversely affect Indian farmers by forcing them to compete against the large transnational corporations which have excessive financial power resulting from their oligopolistic control over world food markets. We note that six conglomerates—Cargill, Continental Grain, Louis Dreyfus, Bunge & Born, Mistui/Cook and Andre-Garnac control 85% of world trade in grain including wheat, corn, oats, and sorghum. Similarly, eight transnational corporations control 60% of world sales of coffee; five corporations control 90% of world tea sales; three conglomerates control 75% of the global banana market; five corporations account for 75% of trade in cocoa; six leaf buyers control 90% of world trade in leaf tobacco; and fifteen companies control 90% of globally traded cotton. Indian farmers cannot be expected to compete against the enormous financial and technological power of these transnational giants of the rich countries, particularly when they are guaranteed a minimum market access. Domestic food production will necessarily be adversely affected and India will be forced to rely largely on food imports.

India's experience with food imports under the P.L. 480 program made it very clear that foreign countries, particularly the U.S., view food as a weapon with which to pressure foreign countries to comply with American political objectives. It is accordingly likely that food imports into India could easily be cut off or jeopardized if India refuses to comply with American demands regarding any sector of trade or foreign relations. We must therefore conclude that the Agreement on Agriculture, by

adversely affecting India's self-sufficiency in food, will have a direct and inevitable effect on the right to food which is an integral component of the right to life guaranteed under Article 21 of the Constitution.

In view of the foregoing changes to existing laws required by the TRIPS Agreement and Agriculture Agreement and the anticipated effect on the price of medicines and self-sufficiency in food, we are of the view that the Final Act will have a direct and inevitable effect on the fundamental right to life enshrined in Article 21 of the Constitution.

On Democracy

The next question to be considered by us is whether the Government of India, in signing the Final Act, violated the principle of democracy which is a basic feature of the Constitution.

In *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, the Supreme Court held that Democracy is an essential feature of the Constitution and part of its basic structure. According to the Court, a sine qua non of democracy is the participation of people in governance. Sawant and Kuldip Singh, JJ. stated as follows at pr. 102:

> "The participation of the people in the governance is a *sine qua non* of democracy. The democratic way of life began by direct participation of the people in the day to day affairs of the society. With the growth of population and the expansion of the territorial boundaries of the State, representative democracy replaced direct democracy and people gradually surrendered more and more of their rights of direct participation, to their representatives . . . If it is true to say that in democracy, people are sovereign and all power belongs primarily to the people, the retention of such power by the people and the anxiety to exercise them is legitimate."

By necessary implication, the people and their elected representatives must be kept reasonably informed of the action of the Executive in order to participate in the process of governance. This view is embodied in Article 75(3) of the Constitution which provides that the Council of Ministers shall be collectively

responsible to the House of the People. Unless the people are provided with information, the Government will be able to avoid any accountability to the people and transparency of decision-making will be illusory. Accountability and transparency of governance are implicit in the Democratic principle.

We must accordingly examine the Government of India's handling of the Uruguay Round negotiations to determine whether the Executive kept the people or their elected representatives reasonably informed of the progress of the negotiations, the stance taken by India and other nations, the reasons for any change in India's stance and the impact of the treaty on the political economy.

At the outset, we note that the Union Government failed to provide either the people, the Parliament or the States with any reasons explaining why India suddenly changed its stance in April 1989 and agreed to expand the scope of the Uruguay Round of negotiations from cross-border trade in goods issues to issues central to the domestic economy such as investment, infrastructural services, and intellectual property rights. The only documents issued by the Union Government were a Press Statement and a Submission to the GATT Secretariat several months after the April 1989 capitulation. Significantly, both of these documents expressed the view that it was not in India's interest to expand the scope of the negotiations and strongly supported India's existing intellectual property laws.

It is further significant to note that during the first five years of the Uruguay Round (1986-1991), the Indian Government failed to make any substantive policy statement to Parliament, the State Assemblies, the Chief Ministers or the people. The Union Government failed to issue any position paper detailing the status of the negotiations, the position taken by various countries, the proposed changes to domestic legislation and anticipated consequences of signing the new treaty on the domestic economy. The written statements issued by the Government were limited to the Press Release and the Submission to the GATT Secretariat, both of which concluded that India's existing intellectual property laws were satisfactory.

It is important to note that the Government of India failed to release any information regarding the progress of the negotiations

until after the issuance of the Dunkel Draft in December 1991. However, the Dunkel Draft was a penultimate draft issued on a "Take it or leave it" basis. By the time the Dunkel Draft was issued, the parameters and much of the details of the new treaty were adequate.

In June 1992, the Ministry of Commerce privately circulated 33 typed pages. The paper is titled "Ministry of Commerce—The Uruguay Round of Multilateral Trade Negotiations—A Paper for Discussion." However, this restricted circulation paper did not contain a policy statement of the Government, did not discuss the antecedent or future stance of the Government or the position of other nations. After the restricted circulation paper of the Ministry of Commerce issued in June 1992, a brief restricted circulation paper was also written on "Implications for India of the Dunkel Proposals on Trade in Agriculture." This document does not amount to an analysis or an impact statement. Its limited circulation virtually makes it an aide-de-memoire to the Government. In September, 1993 a public document was issued to the members of Parliament by the Ministry of Commerce entitled, "The Uruguay Round of Multilateral Trade Negotiations: A Background Paper for Discussion", (August 1993). However, this paper also failed to provide a comprehensive analysis of the impact of the Final Act. The June 1992 and September 1993 documents cannot form the basis for informed participation by the people or their elected representatives in the decision-making process or form a basis on which the people or Parliament can hold the Union Government accountable for its decision to sign the Final Act.

It is further important to note that no substantive discussion ever took place in Parliament. On December 23, 1992, Members of Parliament protested the lack of any debate on the Dunkel Draft and demanded information from the Government regarding the status of the negotiations. Again, on 28th August, 1993, the Members of Parliament protested again against the lack of debate on the Dunkel Draft. The Prime Minister refused to slow down the negotiating process pending Parliamentary debate.

The Union Government has also rejected the demands of Chief Ministers of four states, West Bengal, Tamil Nadu, Rajasthan and

Orissa for consultations regarding the state subjects, like agriculture, which will be affected by the Final Act. Moreover, the Union Government ignored the conclusions of a Standing Committee of the Parliament ("Gujral Committee") which declared that each of the six critical areas of the treaty promised adverse consequences for the country.

In view of the foregoing history of the Government of India's handling of the Uruguay Round, we conclude that the Union Government has engaged in negotiations at GATT in a manner which escapes any democratic discipline, namely, the Union Government has failed to inform the Parliament, the State Assemblies, any other branch of government or the public of the position it took at the Uruguay Round, the reasons supporting such position and any changes thereto, and the stance taken by other nations. The Government never issued a comprehensive analysis of the impact of the proposed treaty on India including basic parameters such as increase in volume of import and exports, effect on employment and inflation. The Government refused to conduct any meaningful discussions in Parliament and even rebuffed requests for consultations by Chief Ministers of several states.

The minimal level of information provided by the Union Government made it impossible for either the people or their elected representatives to meaningfully participate in the decision of whether to sign the Final Act or render the Union accountable for its actions. The evasion of any accountability to the people and the lack of transparency of decision making renders the Union Government's conduct of negotiations at the Uruguay Round in violation of the Democratic Principles which are part of the basic structure of the Constitution.

On Sovereignty

We are further called upon to examine whether the Government's signing of the Final Act constitutes a violation of India's sovereignty. The Preamble to the Constitution states that "We the People of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular Democratic Republic . . ." It is a settled part of our jurisprudence that the Preamble sets forth the goal of our

political society so that it may be invoked to determine the ambit of fundamental rights because it is the ideals of sovereignty, socialism, secularism and democracy which are elaborated by the provisions of the Constitution. As stated by D.D. Basu in *Shorter Constitution of India,* (Eleventh Edition, 1994), "In short, in the matter of interpretation of the provisions of the Constitution as well as of a statute . . .the Court is relying on the objects enshrined in the Preamble to the Constitution, wherever the language of the enacting provision permits."

In *S.R. Bommai v. Union of India,* (1994) 3 SCC 1 at pr. 258, the Supreme Court, per K. Ramaswamy, J., stated:

> "The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution."

Accordingly, the interpretation of Articles 73 and 253 must take into consideration the implications of the exercise of the treaty making power on India's sovereignty.

The concept of sovereignty has two aspects—one is external and the other internal. As stated by the Supreme Court in *Maganbhai v. Union of India,* AIR 1969 SC 783, the external sovereignty of India means that it is not subject to the control of any other State or external power; and secondly, that it can acquire foreign territory and also cede any part of the Indian territory, subject to limitations (if any) imposed by the Constitution. In *Synthetics v. State of U.P.,* (1990) 1 SCC 109, the Supreme Court observed that the internal aspect of sovereignty, in turn, means that the nation has the power to legislate on any subject, to promote the health, morals, education and good order of the people, subject only to the federal division of legislative powers and other limitations imposed by the Constitution e.g., the fundamental rights. The Supreme Court (at pr. 56) stated,

> "The Indian State, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This

power of sovereignty is, however, subject to constitutional limitations. This power according to some constitutional authorities, is to the public what necessity is to the individual."

This takes us to the question of whether the Final Act impinges on India's internal sovereignty by preventing the Centre or the States from legislating on any subject. The Final Act is comprised of 28 sections and covers subject in virtually the entire economy, *inter alia*, agriculture investment, intellectual property, textiles, pharmaceuticals, health and sanitary standards, regulation of the professions, banking and finance, insurance, telecommunications and air transport.

By providing detailed requirements in numerous areas of the domestic economy, the Final Act usurps the legislative power of the Centre and the States to a great extent. The legislative power of the Centre and the States is enumerated and divided in the Seventh Schedule of the Constitution read with Article 246. The Final Act deprives the Centre of its exclusive legislative power qua the following entries on List I of the Seventh Schedule:

List I

E. 29 Airways, aircraft and air navigation . . .

E. 30 Carriage of passengers and goods by railways, sea or air, or by national waterways in mechanically propelled vessels;

E. 31 Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

E. 36 Currency, coinage and legal tender; foreign exchange

E. 41 Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.

E. 43 Incorporation, regulation and winding up of trading corporation, including banking insurance and financial corporations but not including co-operative societies..

E. 44 Incorporation, regulation and winding up of corporations, whether trading or not, with object not confined to one State, but not including universities..

E. 45 Banking.

E. 46 Bills of exchange, cheques, promissory notes and other like instruments.
E. 47 insurance.
E. 48 Stock exchanges and futures markets
E. 49 Patents, inventions and designs; copyright; trade marks and merchandise marks.

The Final Act deprives the States of their exclusive legislative power qua the following entries on List II of the Seventh Schedule.

List II

E. 6 Public health and sanitation, hospitals and dispensaries.."
E. 14 "Agriculture, including agricultural education and research, protection against pests and prevention of animal diseases.."
E. 15 "Preservation, protection and improvement of stock and prevention of animal diseases.
E. 18 Land . . . (including transfer and alienation of agricultural land, land improvement and agricultural loans . . ."
E. 23 Regulation of mines and minerals development (subject to the Union's regulatory power under List I E. 33).
E. 24 Industries, (subject to the Union's regulatory power in List I Entry 7 and 52).
E. 26 Trade and Commerce within the State (subject to the Union's regulatory power under List III E. 33).
E. 27 Production, supply and distribution of goods, (subject to the Union's regulatory power under List I E. 33).
E. 28 Markets and Fairs.
E. 31 . . . Corporations

The Final Act affects the shared legislative power of the Centre and the States qua the following entries of List III of the Seventh Schedule:

List III

E. 18 Adulteration of foodstuffs and other goods.
E. 19 Drugs and poisons (subject to the Union's power under List-I E. 59 on opium).
E. 20 Economic and social planning.

E. 21 Commercial and industrial monopolies, combines and trusts.
E. 26 Legal, medical and other professions (affecting services).
E. 33 Trade and commerce in and the production (in respect of industrial goods . . . foodstuffs including edible oil seeds and oils, cattle fodder, raw cotton and jute).
E. 34 Price control.
E. 36 Factories.

In view of the fact that the Final Act deprives the Centre and the States from legislating on such an extensive list of subjects, we conclude that the Final Act constitutes a surrender of India's sovereignty.

We have dwelled into these constitutional questions taking both a wider and narrower view of the constitutional enterprise. The issues are not narrow issues of law and legality but democracy, justice and constitutional governance. From both the narrow and wider perspectives, the Uruguay Round negotiations have been conducted by the Union of India in a way that has undermined democracy in ways inimical to fundamental rights and re-written India's Constitution in ways subversive of its basic structure. The people for whom the Constitution exists have been excluded from knowledge of what is in store for them. The States have been denied consultation even though the Uruguay Round affects the latter's rights and responsibilities in that most crucial of areas—agriculture. The sovereignty of the nation has been bargained away. Such a treaty is not constitutionally binding within the Indian Constitutional system and, in the facts and circumstances, cannot be given effect to.

Chapter 8

Conclusion

INTRODUCTION TO CONCLUSION

The expanding universe of trade has had a material base from ancient days but in modern times, nations with exploitative appetites and profit-hungry motivations, have been competing to enlarge their share of world turnover of business with shady designs. Unregulated scrimmage in the international trade arena would lead to entropic and chaotic consequences and collisions and from this realization was born the General Agreement on Tariffs and Trade which first came into force on 1 January 1948. India was among the founding members and the original objective was, according to the text, to conduct trade in a regulated fashion, moving towards a fair reduction of tariffs and other barriers and discriminatory treatment in international commerce. The benign accent was on trade by expanding the production and exchange of goods and raising the standards of living "ensuring full employment", "growing volume of real income defending the full use of the resources of the world and expanding the production and exchange of goods". Such was the beginning. These objectives were distances away from pampering the rich countries and pauperizing the poor countries, from distortion of production of goods with exploitative impact on the resources of the weaker nations through' investing in areas of high profits to the developed countries' big corporations, depleting the resources and inhibiting the productive initiatives of the developing countries and using the power of finance capital and high technology to rob the

economy of less endowed peoples. In short, GATT of 1948 vintage was a plot to aggrandize the larger wealth of the nations of the Economic North by a dubious trade device of aggravating the poverty of the Economic South to the enrichment of the former. This perversion, which was covertly crept into GATT particularly at the eighth Uruguay Round and sanctified by signatures of 117 countries, at Geneva and Marrakesh this year is fundamental reversal of the founding intent of GATT 1948.

"Reciprocal and mutually advantageous arrangements", inscribed in the 1948 Preamble to the GATT process, were geared to the uplift of the standard of living and larger employment for the peoples of the indigent parts of the earth and towards that end, an equitable global project focused on trade in goods, *not* an iniquitous imposition on the bleeding, developing nations struggling for a fair deal in world trade. To make the *right to life* of the billions of humans inhabiting the Third World a meaningful material-cultural and developmental reality was integral to the early GATT goals. The Preamble to the first GATT Act brings out these seminal values which are the seeds of a New Just World Economic Order. Such an International Trade Order is allergic to the insatiable appetite of the affluent G-7 nations if they seek to gormandize and victimize the G-7 nations and others already reeling under the predatory operations of multi-national corporations. The 1994 GATT reincarnation, *a deja* vu of the Good Samaritan concern of the economic North to the economic South, has come in for sharp attack and strong defense from the economic and political angles. But, whoever be right, the *legal mutations* necessary under the Dunkel Final Act (DFA), as modified by later negotiations to become the Final Text of the Uruguay Round 1994, have not yet received sufficient attention, although law can never go it alone and is intertwined with economic and political realities. Even so, law has an autonomy and power of control, more so when rooted in a written Constitution. Seton Pollock's wisdom is relevant here:

> "The law itself, though of crucial social importance, is only one element in the total human task. The task is to meet and master those frustrations that diminish man in his humanity and obstruct the realization of his

> freedom and fulfilment within the human society. Those frustrations stem from ignorance, poverty, pain, disease and conflicts of interest both within the person (the field of psychological medicine) and between persons (the territory of the law). These manifold and interacting frustrations cannot be met by any one discipline but only by a co-ordinated attack upon the problem through enlightened political and administrative initiatives and by educational, medical, psychological and legal remedies."
> [In the Preface to the book "English Legal Aid System—at p. vi]

Fragmented disciplines, economic, political or cultural, cannot get a holistic grasp of the consequences of such a globoramic instrument as GATT 1994. The burning issues of our times are the development and distribution of our human and material resources so as to accomplish the upgradation of the human condition of the lowliest, the lost and the last. That is the quintessence of the New World Human Order. Of course, our universe of diverse systems, with pathological deprivations and deficiencies cannot be subjected to Procrustean equality. Each system must be related to its own realities, historical legacies and futuristic tryst with destiny. Mankind is one society containing many societies, but the march of development must be conditioned not by the pace of powerful nations but by the social needs of the handicapped sector of humanity. 'Might is right', if applied among unequals may give us fright because justice then becomes merely the interest of the stronger; the 'unjust' will lord it over the debilitated and the deprived, and the 'just' will be the loser in the long run. The powerful of the earth will coerce the lesser nations to rewrite their laws to serve the interests of the advanced countries. This is precisely what the Final Act of the Uruguay Round is apprehended to do with India: it may force the country's legal structures the weaker nations to be remoulded to fall in line with the dictates of the U.S. and like Powers incorporated in the GATT Agreements.

When the dominant forces seek to prise open and rob the markets and the stored-up resources of weaker nations, patriotism transformed into law must resist this expropriatory lust lest the common masses should suffer further deprivation. So far as India

is concerned or, for that matter, the Third World, social justice and socialistic slant are necessary components of political, economic and social democracy. This is an Indian constitutional fundamental. It is perhaps appropriate to remind ourselves, right at the beginning, about this non-negotiable mandate. Article 38 reads:

"*38. State to secure a social order for the promotion of welfare of the people.*

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

To-day, the State and the instrumentalities under it are bound by this larger objective which broadens the humanism and deepens the social justice component of our tryst with destiny to redeem which is the irrevocable purpose and irreversible process of the constitutional order.

The founding fathers of Free India were far-sighted and profound in their vision, had their feet hard on the human condition and were committed to the obliteration of the die-hard social injustices writ large on the penurious polity. The process was democratic, the project was socio-economic salvation and the locomotive of this transformation was the blood, toil, tears and sweat of the vast masses who are the real sovereign and whose surrogates are the ministers and minions, legislators and bureaucrats, judges and all other exercising authority in the name of the Indian Republic. Dr. Ambedkar, the principal architect of the Constitution, had, in his final address to the Constituent Assembly, underscored the triple imperatives which were the founding faiths of our polity:

> "The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of

> it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy.
>
> We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th January 1950, we are going to enter into a life of contradictions.
>
> In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? . . . If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up".

GATT 1994 may aggravate the explosive potential of inequality, if the foreign giant corporations occupy our economic space and accentuate inequalities.

The source of all power, Executive, Legislative and Judicial, is the Constitution. If there be a conflict between the GATT agreements and the Constitutional mandates, the latter will invalidate the former so far as the Indian jurisdiction and jurisprudence are concerned. In the great words of U.S. Chief Justice Marshall in *Marbury v. Madison*, "certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the Constitution, is void". A mere decision of the Council of Ministers pro tem, who are in power *under* the Constitution, is an a *fortiori* case. In India, Art. 13

expressly declares void any law (or executive act) in derogation of or abridges fundamental rights. Other Contra-Constitutional action too will be shot down by writ of Court. Why? Because Art. 141 vests final authority in the Supreme Court to declare the law, which binds all.

Our Constitution, as it runs to-day, has created a 'Sovereign Socialist Secular Democratic Republic'. The adjectives are not idle diction but pregnant with potence and the Preamble to this Paramount Deed luminously explicates the values packed into the description of our Republic. It follows that the GATT Agreements must be tested on the touchstone of the Constitution. Nay more; beyond the text and impregnable even by any constitutional amendment are the basic features of the Constitution. We may have to ascertain these basics and in their light scrutinize the vires of the international treaty so far as India is concerned.

We hasten to make our position in this report perfectly plain. What we offer are but tentative, not final. We are alive to our limitations and do not asset any infallibility or authority. Nor is it our intent to influence the conclusions of any court in any case or controversy pending before the Judges. Indeed, our purpose is to place before the people our understanding of the GATT impact on the law of the land and the socio-economic and developmental future of the nation. It is our fundamental duty under Art. 51 A (a) 'to abide by the Constitution and respect its ideals and institutions' and this duty necessarily postulates the obligation to express our views and inform fellow citizens on matters which are likely to be legal/constitutional, technical and interpretationally complicated, more so when the subject is a very prolix, highly esoteric, arcanely jargonised, riddled with acronyms and annexes, and covering a vistarama of international law and relations which affect the national interests and developmental initiatives of nearly a billion Indians striving to fulfill the multiple urges and aspirations implicit in *purna swaraj* and the Preamble to the Constitution. We express the result of our study in the hope that our provisional report to the people of this country will set them thinking on the issues and inform themselves as citizens about so grave and pervasive a matter as the whole gamut of GATT affecting the fortunes of the millions

of our land and their fate in the future from agriculture and industry to intellectual property, science and technology, banking and insurance and a bewildering crowd of Trade-Related-Investment items and imports which will indubitably shake and shape India and Indians on the verge of the millennium. The right to know, to express and to act are fundamental to fundamental rights, especially because the invitation to enter this broad spectrum treaty is not a temporary involvement but a permanent commitment. Therefore, every citizen must become aware and influence decision-making. As the old Roman adage says "whatever touches us all should be decided by all". On the several central issues embedded in GATT, we express no final judgment, but merely state our thoughts opinions and considered conclusions. Let no one be under the illusion that we are playing the role of interfering with any legal proceedings. We are doing nothing more and nothing less than presenting our inferences which may mould the democratic process of people's verdicts.

With this caution we proceed and sincerely plead that even where we seem to put our point of view forcibly there is not the slightest pretence of infallible pronouncement. First, we may deal with the constitutional perspective taking note of the fact that the Commerce Minister has appended his signature to the Dunkel Final Act. More things have to be done before the text of the WTO becomes binding on the Indian people. This is a critical hour when Ministers at the State and Central levels, people everywhere in the country and intellectuals whatever their colour must exert themselves to understand the implications of and insist on the applications to the GATT re-born as the WTO. Indeed, this is a fundamental duty to the present and future generations that our generation owes right now. As Alfred North Whitehead wrote: "Duty arises from our potential control over the course of events. Where attainable knowledge could have changed the issue, ignorance has the guilt of vice."

Can the pen with which the Commerce Minister of India signed the Final Text at Marrakesh rob our Republic of its Sovereign, Socialist Constitutional structure and people's fundamental rights? Is there a conflict between the Final Act and the Indian Constitution as it now stands? If there be any which will prevail?

It is noteworthy that the Commerce Minister and his colleagues have repeatedly told the country that GATT 1994, and the WTO midwifed from it are for the good of India. This position has to be examined not merely from the economic angle but also from the legal and constitutional angles.

Where do the GATT governed Jurisprudence of Intellectual Property and the Indian Patent system contradict each other and how far does the Constitution of India accommodate the TRIPS regime? That is the central issue. So long as our Socialist Democratic Constitution lasts, the GATT philosophy of 'grab markets liberally and globally' will not gain open sesame into Bharat if TRIPS tramples upon the basics of our Founding Deed which crystallizes the enduring values fundamental in the governance of the country. Not the political convulsions and parliament's turbulences but the mandates, loud and clear, of the National Charter, which grants authority to States and Centre, bind us. Of course, our founding fathers did not indulge in legal abstractions and draw lines of omnipotence in the sky but engraved for future generations a Paramount Parchment charged with social justice, rooted in economic realities of our people and belighted by a political vision to forsake which is to jettison the precious essentials of Independence. So we must face the gut problem of GATT vis a vis the Indian Constitution. We may confine the discussion for the present to the TRIPS, although the emanations therefrom will apply to TRIMS and GATS. There is no getting away from the basic constitutional proposition that the Court's rulings on constitutional law are as potent and inviolable as the Constitution itself read in the light of the Article 141. The law in America is the same as the Court in *Cooper* elevated its pronouncements to the same level as the Constitution itself. Earl Warren's words are constitutional wisdom:

> "Article VI of the Constitution makes the Constitution the "supreme Law of the Land". In 1803, Chief Justice John Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* . . . that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the

> basic principle that the federal judiciary is supreme in the exposition of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown case* is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [358 U.S.I. 18

The emphasis we lay on the Constitution and the Court is not because legal formalism can overpower hard economics, but because the ministers and other spokesmen promoting the sale of the Final Act text rarely refer to the paramountcy of the Constitution itself and its judicial interpretation. Humanism, is the quintessence of the Constitution. Judges who bring compassion in the quest for justice which is the foremost human rights of the "People of India" are competent interpreters. Read the noble *Preamble which is the basic structure of the Constitution* and read the GATT commands of TRIPS, TRIMS and GATS; and then Justice Blackmun's observation about constitutional interpretation will assume a new meaning. He said "until our composite sketch becomes a true portrait of humanity, . . . we will grope, we will struggle, and our compassion may be our only guide and comfort." [489 US 189 (1988) at 213]

So we submit that the humanism of the Constitution and the compassion of the Court will navigate the Nation towards or away from the WTO and its prolix text and annexes. We gather that some States have taken litigative resort to Supreme Court justice and what the Judges pronounce must be our final refuge.

After this divagation let us get back to TRIPS.

It is questionable whether Intellectual Property so called comes within the founding ambit of GATT in its original structure. Assuming the rather ambiguous and dexterous inclusion of TRIPS is a fait accompli, any structural mutations to be wrought into the Indian Patents Act must be Constitution-friendly and socially value based, since imperial occupation through technological invasion is anathema to the spirit of our Founding Deed.

CONCLUSION ON VARIOUS SUBMISSIONS

The extensive written and oral submissions which have been made before us by the learned counsel, academicians and scientists make it clear that one fact is undisputed: the Final Act is *sui generis* among modern treaties in that it does not limit its concerns to cross-border issues such as the levy of tariffs and quotas or boundary disputes. Instead, the Final Act intrudes extensively in every aspect of the domestic economy. The Final Act seeks to restructure vital areas such as domestic food supply, production of essential medicines, sanitary and health standards, manipulation of genes and creation of new life forms, investment parameters, infrastructure, telecommunications, air transport, banking, insurance, and the entire-service economy. There is virtually no sector of economic life which remains untouched by the Final Act. The Final Act is, in short, an invasion of a new form, a transformed East India Company, which seeks to subject the structure and function of the Indian economy to external diktat. This is revitalized and restructured economic colonialism in that the nation state is once again marginalized. This time, however, no single foreign power bears the mantle of colonial rule. The locus of control is instead masked and muted behind the veil of contractual consent by all nations to the new internationalism dovetailed in the euphoria of liberalization and privatisation sweeping the world in the aftermath of the Soviet Union.

If the nature of the Final Act is *sui generis*, so to has been its genesis. For the first time, the concerns of democratic governance, namely, the transparency and accountability of decision-making have been shifted from the national level to the international scenario. Once the concerns were whether national and state governments disclosed sufficient information to the people to permit informed decision-making. Today, what is disturbing is whether entire state governments have been kept ignorant of negotiations by the executive on matters which fall exclusively within their legislative purview such as agriculture. Likewise, one now wonders whether the entire Union Parliament has been dodged and deceived by an Executive which has negotiated away its sovereign legislative power without so much as bringing the

matter to Parliament's attention. We face a situation in which Chief Ministers of several states have repeatedly sought consultation and briefings with the Prime Minister only to be met with stony silence. The meaning of democratic discipline has been transformed and made ever more difficult by the fact that grass roots activists and social groups must lobby and pressure the executive not only at the national level but at exotic locations such as Punta del Este, Uruguay.

Further, the Government of India now has at its disposal reasons and justifications which appear inscrutable. The first is that it lacked the support of the rest of the developing world. Yet, the reasons for the dissolution of the Group of 77 have never been made clear to the Indian nation. Instead, we witnessed dramatic reversals in the Union's stand without any explanation as to why and when it found itself alone on the world's stage. This argument of isolation is invoked to justify all the concessions and agreements made by the Government of India even while acknowledging the anticipated adverse effects such as the increase in drug prices or dependency on foreign food imports.

Second, the new imperative of globalisation at all costs has also been invoked to make the signing of the Final Act a virtual fait accompli. We are told that we cannot survive outside the new system. Yet, even after signing the Final Act, India still remains isolated. The South Asian countries are the only ones remaining outside a regional trading bloc. While the U.S., Canada, Mexico and soon the rest of Latin America will enjoy preferential treatment within NAFTA, the European nations will enjoy the same within the European Union. Likewise, the nations of the Far East will benefit from the preferential arrangements of APEC. India is the only major industrial power which, in the aftermath of the Uruguay Round will not be part of any regional bloc in which it enjoys preferential treatment as opposed to non-members. This will place India in a distinct trade disadvantage which it already bears qua the richer nations.

Notwithstanding the new ideology invoked by the Union to justify the Final Act, the bare facts regarding its socio-economic impact are unavoidable. Even the Government admits that we will witness astronomical increases in the prices of medicine and

there is no mechanism to ensure that essential medicines will be available to the poor. The Government also anticipates that the adverse impact on the domestic pharmaceutical industry will be collossal. In anticipation, these companies have hurriedly entered into collaborative agreements with foreign companies such as Eli Lilly and Ciba Geigy so that shortly there may no longer be a domestic pharmaceutical industry. Further, despite the promises of a ten year transition period, the reality is that in 1995 itself, India will have to provide a mechanism for accepting product patent applications for drugs, medicines and chemical products and by 2000 provide exclusive marketing rights qua these products. In addition, the much vaunted *sui generis* protection of plant varieties is nothing more than patent protection by another name. Although India has summarily assumed that it is the more lenient 1978 version of UPOV which will be the international standard, there is nothing in the treaty which prevents the WTO from requiring adherence to the more stringent 1991 version of UPOV.

The adverse effects on agriculture are equally inescapable. Despite the much vaunted footnotes in the final version of the Agriculture Agreement, the fact remains that support provided in terms of the Public Distribution System (PDS) will be included in determining the Aggregate Measure of Support (AMS). Moreover, the PDS will be subject to external scrutiny in terms of whether it is transparent and subisidies are provided to people who are poor enough. Amazingly, the way India attempts to provide for its impoverished has suddenly become the concern of the overfed and overstocked rich nations of the world. Worse, those nations have secured a right to tell India to stop providing subsidized food to the poor under threat of retaliation. In addition to the PDS, other support given to farmers is now subjected to the 10 per cent de minimus ceiling. Therefore, despite the climatic variations and other hardships, farmers will find themselves without the price and other infrastructural support needed to ensure self-sufficiency in food production. It is sad that one of independent India's most important accomplishments, self-sufficiency in food, is being destroyed at foreign instance.

Further, sanitary and health standards will now be dictated from abroad. Although domestic standards bear considerable

improvement, in some areas such as regulation of hazardous pesticides, Indian laws are more stringent and progressive than those of the Codex Alimentarius Commission.

Under the Final Act, the entire service sector, which is the commanding height of the post-industrial economy, is subject to international scrutiny and control. Basic issues such as whether foreign lawyers can appear in Indian courts will not longer be the province of the Union Parliament or Bar Councils but be regulated by the WTO. Other decisions such as whether banks should be allowed to open more branches or whether the insurance sector, a critical savings and investment area, should be open to private investment will be governed by the Final Act and interpreted by the WTO. Even parameters regulating foreign investment are now under the aegis of foreign supervision under the TRIMS Agreement. No sector of any importance in a modern economy remains outside the ambit of the Final Act.

In short, the Union Parliament and the state legislatures have been ousted of their legislative sovereignty over an extraordinary range of matters. Even domestic agriculture, under the purview of the state governments, has been transferred wholesale to the WTO. The unavoidable conclusion is a loss of legislative and executive sovereignty and the increasing irrelevance of the Union Parliament as an instrument of governance. Worse still, all this has been accomplished without even the knowledge or consent of the Parliament, under circumstances in which the Prime Minister expressly stated that he would not wait for a parliamentary debate pending negotiations. Negotiations were conducted in a clandestine and covert fashion and the only information ever provided to the people, that too at the end of the day, were statistics furnished by the OECD.

Despite the anticipated adverse consequences of the Final Act and the total lack of democratic discipline over the negotiating process, there has been a total lack of constraint over the executive's treaty making power. This is in marked contrast to mast other countries in the world. For example, the Final Act has been subjected to ratification by the U.S.Congress without which it has no binding power even qua the nation itself. In fact, the Final Act itself states that the contracting party should submit it for approval

by the relevant authority in the respective nations. Yet, notwithstanding the extraordinary reach of the Final Act into every aspect of India's future, no such parliamentary or other scrutiny has taken place. Instead the executive's actions have been taken as a fait accompli and the nation waits quietly for the final hour when the signature indicating its entry into force is made. Under these circumstances, it is imperative to examine the constitutional constraints over the executive's treaty making power. Emanating from the constitution, the treaty making power is subjected to constitutional control and cannot be violative of the rule of law.

Perhaps, the Indian Minister's signature to the GATT Final Act brings to mind the following lines:

> "Now as through this world I ramble,
> I have seen lots of funny men,
> Some will rob you with a six-gun,
> And some with a fountain pen."
>
> —*Woodie Gutterie, USA.*

The Constitution and its great Preamble which are paramount remind us that we have 'promises to keep and miles to go before we sleep', if the people's sovereignty is to be a reality.

Ministers and their minions urge that in the long run Indian agriculture and industry will discover great opportunities for technologically advanced production and large scale export *in the long run. Man lives in the short run* and so too Indian development. Our analysis of the socio-economic and constitutional consequences of GATT ratification suggests that the higher echelons in government are indulging in Orwellian double-think, double-speak and newspeak when they say that glorious prospects for affluent consumerism, five-star tourism and automobile glamourism and so on await the little Indian *who lives in the short run.* Political rhetoric about distant prosperity persuades us to tell these prophets of Indian advance to listen to Gandhiji who once said what holds good even to-day:

> "Don't be dazzled by the splendour that comes to you from the West. Do not be thrown off your feet by this passing show." [M.K. Gandhi—Socialism of My Conception—Page 27]

I do not believe that multiplication of wants and machinery contrived to supply them is taking the world a single step nearer its goal . . . I whole-heartedly detest this mad desire to destroy distance and time, to increase animal appetites and go to the ends of the earth in search of their satisfaction. If modern civilization stands for all this, and I have understood it to do so, I call it Satanic." [Young India: March 17, 1927]

"Come with me to Orissa, to Puri—a holy place and a sanatorium, where you will find soldiers and the Governor's residence during summer months. Within ten miles' radius of Puri, you will see skin and bone. With this very hand I have collected soiled pies from them tied tightly in their rags, and their hands were more paralyzed than mine were at Kolhapur. Talk to them of modern progress. Insult them by taking the name of God before them in vain." [M.K. Gandhi: Socialism of My Conception—Page 109

"The poor sisters of Orissa have no saris; they are in rags. Yet they have not lost all sense of decency; but, I assure you, we have. We are naked in spite of our clothing and they are clothed in spite of their nakedness." [IBID Page 110]

If the Constitution is what the Judges have told us it is and the text with the Preamble explicates it, the TRIPS part vis a vis Indians will in all probability be *ultra vires.*

Annexes

Annex 1

Eminent Experts Who Made submissions (Oral/Written) Before the People's Commission on GATT Issues.

1. **Dr. Nitya Nand,**
   Former Director, Central
   Drug research Institute, and
   Chairman, National Working
   Group on Patent Laws.
2. **Dr. Arun Ghosh,**
   Former Member,
   Planning Commission.
3. **Prof. Upendra Baxi,**
   Former Vice Chancellor,
   University of Delhi.
4. **Dr. Rajni Kothari,**
   Former Member,
   Planning Commission.
5. **Prof. Yash Pal,**
   Former Chairman,
   University Grants Commission.
6. **Shri S.P. Shukla,**
   Former Finance Secretary,
   Government of India, and
   Co-Chairman, National Working
   Group on Patent Laws.

7. **Shri Prem Kumar,**
   Former Commerce Secretary,
   Government of India.
8. **Prof. Muchkund Dubey,**
   Former Foreign Secretary,
   government of India.
9. **Shri Balraj Mehta,**
   Senior Journalist, and
   Member, National Working
   Group on Patent Laws..
10. **Dr. Deepak Nayyar,**
    Professor,
    Jawaharlal Nehru University.
11. **Dr. Abhijit Sen**,
    Professor,
    Jawaharlal Nehru University.
12. **Dr.V.Kurien,**
    Chairman,
    National Dairy Development Board.
13. **Dr. S. Vedaraman,**
    Former Controller General,
    Patents, Designs and Trade Marks.
14. **Dr. Rajeev Dhavan,**
    Director, Public Interest, Legal
    Support and Research Centre, and
    Senior Advocate,
    Supreme Court of India.
15. **Dr. Vandana Shiva,**
    Director, Research Foundation
    For Science, Technology and
    National Resouree Policy.
16. **Shri Indrajit Gupta,**
    Member of Parliament, and
    General Secretary,
    Communist Party of India.
17. **Shri George Fernandes,**
    Member of Parliament, and
    President, Samata Party.

18. **Shri S. Jaipal Reddy,**
    Member of Parliament,
    Janata Dal
19. **Shri T.N. Chaturvedi,**
    Member of Parliament,
    Bharatiya Janata Party.
20. **Dr. Ashok Mitra,**
    Member of Parliament,
    Communist Party of India (Marxist).
21. **Shri Raju Ramachandran,**
    Senior Advocate,
    Supreme Court of India.
22. **Shri R. Venkataramani,**
    Senior Advocate,
    Supreme Court of India.
23. **Shri Prashant Bhushan,**
    Senior Advocate,
    Supreme Court of India.
24. **Shri B.K. Keayla,**
    Former Commissioner of Payments,
    Government of India, and
    Convenor, National Working
    Group on Patent Laws.
25. **Shri Dinesh Abrol,**
    President, CSIR Scientific
    Workers' Association, and
    Co-Convenor, National Working
    Group on Patent Laws.
26. **Dr. Biswajit Dhar,**
    Fellow, Research and Information
    System for the Non-aligned and
    Other Developing Countries, and
    Co-Convenor, National Working
    Group on Patent Laws.
27. **Ms. Usha Menon,**
    Secretary, Delhi Science Forum, and
    Co-Convenor, National Working
    Group on Patent Laws.

28. **Prof. S.K. Mukherjee,**
    Professor of Eminence (Retd.), IARI, and
    Member, National Working
    Group on Patent Laws.
29. **Shri Ravi Kiran Jain,**
    Advocate,
    Allahabad High Court.
30. **Shri K. Ashok Rao,**
    President, National Confederation
    of Central Public Undertakings, and
    Member, National Working
    Group on Patent Laws.
31. **Dr. N.S. Gopalakrishnan,**
    Professor,
    National Law School of
    India University, Bangalore.
32. **Prof. T.K. Bhaskaran,**
    Professor,
    National Law School of
    India University, Bangalore.

Annex 2

The Punta Del Este Declaration

[Meeting in Punta del Este (Uruguay), 15–20 September 1986, on the occasion of the Special Session of GATT Contracting Parties, ministers of member-countries of GATT adopted the declaration launching a new round of Multilateral trade negotiations. The Declaration itself is in two parts:

First, meeting as contracting parties, the ministers adopted Part I of the Declaration, a decision to launch Multilateral Trade Negotiations on trade in goods. Second, as representatives of governments meeting on the occasion of the Special Session, the ministers adopted a declaration to launch negotiations on trade in services. Third, the ministers then adopted the Declaration as a whole.]

Ministers, meeting on the occasion of the Special Session of CONTRACTING PARTIES at Punta del Este, have decided to launch Multilateral Trade Negotiations (The Uruguay Round). To this end, they have adopted the following Declaration. The Multilateral Trade Negotiation (MTN) will be open to the participation of countries indicated in Parts I and II of this Declaration. A Trade Negotiations Committee (TNC) is established to carry out the Negotiations. The Trade Negotiations Committee shall hold its first meeting not later than 31 October 1986. It shall meet as appropriate at Ministerial level. The Multilateral Trade Negotiations will be concluded within four years.

Part I

NEGOTIATIONS ON TRADE IN GOODS

The CONTRACTING PARTIES meeting at Ministerial level

Determined to halt and reverse protectionism and to remove distortions to trade;

Determined also to preserve the basic principles and to further the objectives of the GATT;

Convinced that such action would promote growth and development;

Mindful of the negative effects of prolonged financial and monetary instability in the world economy, the indebtedness of a large number of less developed contracting parties, and considering the linkage between trade, money, finance and development;

Decide to enter into Multilateral Trade Negotiation on trade in goods within the framework and under the aegis of the General Agreement on Tariffs and Trade.

A. Objectives

Negotiations shall aim to:

(i) bring about further liberalisation and expansion of world trade to the benefit of all countries, especially less-developed contracting parties, including improvement of access to markets by the reduction and elimination of tariffs, quantitative restrictions and other non-tariff measures and obstacles;

(ii) strengthen the role of GATT,improve the multilateral trading system based on the principles and rules of the GATT and bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines;

(iii) increase the responsiveness of the GATT system to the evolving international economic environment, through facilitating necessary structural adjustment, enhancing the relationship of the GATT with the relevant international organizations and taking account of changes in trade patterns and prospects, including

the growing importance of trade in high technology products, serious difficulties in commodity markets and the importance of an improved trading environment providing, *inter alia*, for the ability of indebted countries to meet their financial obligation;

(iv) foster concurrent cooperative action at the national and international levels to strengthen the interrelationship between trade policies and other economic policies affecting growth and development, and to contribute towards continued, effective and determined efforts to improve the functioning of the international monetary system and the flow of financial and real investment resources to developing countries.

B. General Principles Governing Negotiations

(i) Negotiations shall be conducted in a transparent manner, and consistent with the objectives and commitments agreed in this Declaration and with the principles of the General Agreement in order to ensure mutual advantage and increased benefits to all participants.

(ii) The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the negotiations. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

(iii) Balanced concessions should be sought within broad trading areas and subjects to be negotiated in order to avoid unwarranted cross-sectoral demands.

(iv) The CONTRACTING PARTIES agree that the principle of differential and more favourable treatment embodied in Part IV and other relevant provisions of the General Agreement and in the decision of the CONTRACTING PARTIES of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries applies to the negotiations. In the implementation of standstill and rollback, particular care should be given to avoiding disruptive effects on the trade of less-developed contracting parties.

(v) The developed countries do not expect reciprocity for

commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e. the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither less-developed contracting parties be required to make concessions that are inconsistent with the latter's development, financial and trade needs.

(vi) Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

(vii) Special attention shall be given to the particular situation and problems of the least-developed countries and to the need to encourage positive measures to facilitate expansion of their trading opportunities. Expeditious implementation of the relevant provisions of the 1982 Ministerial Declaration concerning the least-developed countries shall also be given appropriate attention.

C. Standstill and Rollback

Commencing immediately and continuing until the formal completion of the Negotiations, each participant agrees to apply the following commitments:

Standstill

(i) not to take any trade restrictive or distorting measure inconsistent with the provisions of the General Agreement or the Instruments negotiated within the framework of GATT or under its auspices;

(ii) not to take any trade restrictive or distorting measure in the legitimate exercise of its GATT rights, that would go beyond that which is necessary to remedy specific situations, as provided

for in the General Agreement and the Instruments referred to in (i) above;

(iii) not to take any trade measures in such a manner as to improve its negotiating positions.

Rollback

(i) that all trade restrictive or distorting measures inconsistent with the provisions of the General Agreement or instruments negotiated within the framework of GATT or under its auspices, shall be phased out or brought into conformity within an agreed timeframe not later than by the date of the formal completion of the negotiations, taking into account multilateral agreements, undertakings and understandings, including strengthened rules and disciplines, reached in pursuance of the Objectives of the Negotiations;

(ii) there shall be progressive implementation of this commitment on an equitable basis in consultations among participants concerned, including all affected participants. This commitment shall take account of the concerns expressed by any participant about measures directly affecting its tirade interests;

(iii) there shall be no GATT concessions requested for the elimination of these measures.

Surueillance of standstill and rollback

Each participant agrees that the implementation of these commitments on standstill and rollback shall be subject to multilateral surveillance so as to ensure that these commitments are being met. The Trade Negotiations Committee shall decide on the appropriate mechanism to carry out the surveillance, including periodic reviews and evlaluations. Any participant may bring to the attention of the appropriate surveillance mechanism any action or omissions it believes to be relevant to the fulfillment of these commitments. These notifications should be addressed to the GATT secretariat which may also provide further relevant information.

D. Subjects for Negotiations

Tariffs

Negotiations shall aim, by appropriate methods, to reduce or, as appropriate, eliminate tariffs including the reduction or elimination of high tariffs and tariff escalation. Emphasis shall be given to the expansion of the scope of tariff concessions among all participants.

Non-tariff measures

Negotiations shall aim to reduce or eliminate non-tariff measures, including quantitative restrictions, without prejudice to any action to be taken in fulfillment of the rollback commitments.

Tropical products

Negotiations shall aim at the fullest liberalisation of trade in tropical products, including in their processed and semi-processed forms and shall cover both tariff and all non-tariff measures affecting trade in these products.

The CONTRACTING PARTIES recognise the importance of trade in tropical products to a large number of less-developed contracting parties and agree that negotiations in this area shall receive special attention, including the timing of the negotiations and the implementation of the results as provided for in B (ii).

Natural resource-based products

Negotiations shall aim to achieve the fullest liberalisations of trade in natural resource-based products, including in their processed and semi-processed forms. The negotiations shall aim to reduce or eliminate tariff and non-tariff measures, including tariff escalation.

Textiles and clothing

Negotiations in the area of textiles and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines thereby also contributing to the objectives of further liberalisation of trade.

Agriculture

The CONTRACTING PARTIES agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets.

Negotiations shall aim to achieve greater liberalisation of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines, taking into account the general principles governing the negotiations, by:

(i) improving market access through, *inter alia* , the reduction of import barriers;

(ii) improving the competitive environment by increasing disciplines on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade, including the phased reduction of their negative effects and dealing with their causes;

(iii) minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements.

In order to achieve the above objectives, the negotiating group having primary responsibility for all aspects of agriculture will use the Recommendations adopted by the CONTRACTING PARTIES at their Fortieth Session, which were developed in accordance with the GATT 1982 Ministerial Programme and take account of the approaches suggested in the work of the Committee on Trade in Agriculture without prejudice to other alternatives that might achieve the objectives of the negotiations.

GATT Articles

Participants shall review existing GATT articles, provisions and disciplines as requested by interested contracting parties, and, as appropriate, undertake negotiations.

Safeguards

(i) A comprehensive agreement on safeguards is of particular

importance to the strengthening of the GATT system and to progress in the MTNs.

(ii) The agreement on safeguards:

- shall be based on the basic principles of the General Agreement;
- shall contain, *inter alia,* the following elements: transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof,temporary nature, degressivity, and structural adjustment, compensation and retaliation, notifications, consultation, multilateral surveillance and dispute settlement; and
- shall clarify and reinforce to discipline of the General Agreement and should apply to all contracting parties.

MTN Agreements and arrangements

Negotiations shall aim to improve, clarify, or expand, as appropriate, agreements and arrangement negotiated in the Tokyo Round of Multilateral Negotiations.

Subsidies and countervailing measures

Negotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN agreement on subsidies and countervailing measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade. A negotiating group will be established to deal with these issues.

Dispute settlement

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties,negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognising the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.

Trade-related aspects of intellectual property rights, including trade in counterfeit goods

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organisation and elsewhere to deal with these matters

Trade-related investment measures

Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade.

E. Functioning of the GATT system

Negotiations shall aim to develop understandings and arrangements:

(i) to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system;

(ii) to improve the overall effectiveness and decision-making of the GATT as an institution, including, *inter alia*, through involvement of Ministers;

(iii) to increases the contribution of the GATT to achieving greater coherence in global economic policy-making through

strengthening its relationship with other international organisations responsible for monetary and financial matters.

F. Participation

(a) Negotiations will be open to:

(i) all contracting parties,

(ii) countries having acceded provisionally,

(iii) countries applying the GATT on a *de facto* basis having announced, not later than 30 April 1987, their intention to accede to the GATT and to participate in the negotiations,

(iv) countries that have already informed the CONTRACTING PARTIES, at a regular meeting of the Council of Representatives, of their intention to negotiate the terms of their membership as a contracting party, and

(v) developing countries that have, by 30 April 1987, initiated procedures for accession to the GATT, with the intention of negotiating the terms of their accession during the course of the negotiations.

(b) Participation in negotiations relating to the amendment or application of GATT provisions or the negotiations of new provisions will, however, be open only to contracting parties.

Organisation of the Negotiations

A Group of Negotiations on Goods (GNG) is established to carry out the programme of negotiations contained in this Part of the Declaration. The GNG shall, *inter alia:*

(i) elaborate and put into effect detailed trade negotiating plans prior to 19 December 1986;

(ii) designate the appropriate mechanism for surveillance of commitments to standstill and rollback;

(iii) establish negotiating groups as required. Because of the interrelationship of some issues and taking fully into account the general principles governing the negotiations as stated in B (iii) above it is recognised that aspects of one issue may be discussed in more than one negotiating group. Therefore each negotiating group should as required take into account relevant aspects emerging in other groups;

(iv) also decide upon inclusion of additional subject matters in the negotiations;

(v) coordinate the work of the negotiating groups and supervise the progress of the negotiations. As a guideline not more than two negotiating groups should meet at the same time;

(vi) the GNG shall report to the Trade Negotiations Committee.

In order to ensure effective application of differential and more favourable treatment the GNG shall, before the formal completion of the negotiations, conduct an evaluation of the results attained therein in terms of the Objectives and the General Principles Governing Negotiations as set out in the Declaration, taking into account all issues of interest to less-developed contracting parties.

Part II

NEGOTIATIONS ON TRADE IN SERVICES

Ministers also decided as part of the Multilateral Trade Negotiations, to launch negotiations on trade in services.

Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalisation and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organisations.

GATT procedures and practices shall apply to these negotiations. A Group on Negotiations on Services is established to deal with these matters. Participation in the negotiations under this Part of the Declaration will be open to the same countries as under Part I. GATT secretariat support will be provided, with technical

support from other organisations as decided by the Group of Negotiations on Services.
The Group of Negotiations on Services shall report to the Trade Negotiations Committee.

IMPLEMENTATION OF RESULTS UNDER PARTS I AND II

When the results of the Multilateral Trade Negotiations in all areas have been established, Ministers meeting also on the occasion of a Special Session of CONTRACTING PARTIES shall decide regarding the international implementation of the respective results.

Annex 3

Press Information Bureau
Government of India

INTELLECTUAL PROPERTY RIGHTS-STANDARD AND PRINCIPAL CONCERNING ITS AVAILABILITY, SCOPE AND USE

The Indian View

To facilitiate discussion in the Negotiating Group, this paper sets out the views of India on "the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights".

At the outset, India would like to point out that the scope of this agenda item is limited to "trade-related intellectual property rights" (TRIPS). For the reasons explained in the paper, India is of the view that it is only the restrictive and anti-competitive practices of the owners of intellectual property rights that can be considered to be trade-related because they alone distort or impede international trade. However, other aspects of intellectual property rights have been examined in the paper since they have been raised in the various submissions made to the Negotiating Group and in order to place them in the wider developmental and technological context to which they properly belong.

India would also like to emphasise that, as mandated by para 5 of the Trade Negotiating Committee (TNC) decision, the discussion on this agenda item should be governed by the concerns and public policy objectives underlying the national systems for

the protection of intellectual property, including developmental and technological objectives. This is particularly important for developing countries because the intellectual property system has wide ranging implications for their economic and social development. Any principle or standard relating to intellectual property rights should be carefully tested against the touchstone of the scoio-economic, developmental, technological and public interest needs of developing countries.

In this context, the nature of the intellectual property protection system should be clearly understood. The essence of the system is its monopolistic and restrictive character; its purpose is not to "liberalise', but to confer exclusive rights on their owners. Recognising the extra-ordinary rights granted by the system and its implications, international conventions on this subject incorporate, as a central philosophy, the freedom of the member States to attune their intellectual property protection system to their own needs and conditions. This fundamental principle should inform and guide all of the discussions in the Negotiating Group on the Intellectual property protection system.

Part-1

PATENTS

Basic Approach

The evolution of the patent system, both in industrialised and developing countries, would clearly establish the fact that there is a close correlation between the level of the economic, industrial and technological development of a country on the one hand, and the nature and extent of patent protection granted by it on the other. In the crucial phase of their industrial development, many of the industrialised countries of today had either "on-patent" or weak patent standards in vital sectors in order to strengthen their own industrial and technological capabilities. It was only after they attained sufficient strength in these areas that

they considered making changes in their patent system. The patent system is an instrument of national economic policy for the industrialisation and technological advancement of a country. In the case of developing countries, it is of foremost importance that the patent system does not block or hinder the building up of their own industrial and technological capabilities. It would therefore not be appropriate for the international community to think in terms of a patent regime that focuses merely on the protection of the monopoly rights of the patent owner, ignoring the enormous differences in the economic, industrial and technological development between industrialised and developing countries. There should be no attempt at harmonisation of the patent laws of the industrialised and developing countries nor should there by any imposition on developing countries of standards and principles that may be relevant to industrialised countries, but are inappropriate to developing countries.

Many economists have questioned the very hypothesis that a patent system is essential to encourage inventions and investments in research and development because, firstly, the patent system is considered to be important by very few sectors of industry and even in their case, the motivation for obtaining a patent is often the apprehension that someone else would come up on the same discovery or invention within a short period of time. Secondly, investment in research and development and technological break throughs are taking place in a wide variety of industries where the patent system is not considered to be important either because the inventions are non-patentable or because the inventions and the know-how could be kept secret for a sufficient period before competitors could come upon them. Thirdly, in a wide variety of industries, investments in research and development are made by firm for maintaining their technological leadership and market position and they would do so regardless of the availability of patent protection. Lastly, even where patents are taken the underlying know-how to operate the patent is kept secret in order to prevent others from operating the patent on the basis of the patent disclosure.

Even assuming that the patent system plays a part in promoting inventive activity and diffusion of technical knowledge, the

protection of the exclusive rights of the patent owner is only one side of the coin. Experience of developing countries clearly shows that a patent system can have serious adverse effects in sectors of critical importance to them, such as food production, poverty alleviation, nutrition, health care and disease prevention. The patent system can also have a dampening effect on the promotion of domestic research and development and the building up of domestic technological capabilities. It is therefore imperative that the protection of the monopolistic rights of the patent owner is adequately balanced by the socio-economic and technological needs of the country. An exclusive and undiluted focus on the monopolistic rights of the patent owner without any regard or concern for his obligations or the possible adverse implications of such protection for the host country will be particularly determinental to the developmental efforts of the developing countries. Such a focus will only widen the gap between industrialised and developing countries and will be contrary to the effort being made in other international fora to bridge this gap and to strengthen the developmental process of developing countries.

A patent law must focus equally on the duties and obligations of the patent owner as well as the remedial steps to be taken to prevent the possible abuse of monopoly rights by him. It should be clearly recognised that patents are not granted merely to enable a patent owner to enjoy a monopoly for the importation of the patented article into the host country or to resort to restrictive and anti-competitive practices.

Working of patents

The experience of developing countries would clearly point to four basic facts: firstly, patents are seldom worked in developing countries, even when it is techno-economically feasible to do so. Secondly, the working of the patent in the host country leads to saving of scarce foreign exchange (which is a major constraint to the economic development of developing countries) and the lowering of prices of products, paraticularly in critical sectors such as food, pharmaceutical, agro-chemicals and the like. Thirdly, without the working of the patent, there can hardly be any transfer

or diffusion of technology and the promotion of industrial activity in the hot country. Fourthly, without working, patent protection would degenerate into a mere monopoly for the importation of the patented article into the country and a device for the reservation of the host country market by the patent owner.

Therefore, the working of a patent by the patent owner in the host country must be regarded as a fundamental obligation of the patent owner. The patent law should have a clear stipulation that patents are granted in order to secure that the inventions are worked in the host country on a commercial scale and to the fullest extent that is reasonably practicable without undue delay. The patent law should also make it unambiguous that the mere importation of a patented product does not amount to its working in the host country. The working of a patented invention should mean:

— where the patent has been granted in respect of a product, the making of the product
where the patent has been granted in respect of a process, the use of the process.

Compulsory Licence

The patent laws of all countries of the world, both industrialised and developing countries, clearly recognise the need for a deterrent against the possible abuse of his monopoly rights by a patent owner and this deterrent is provided in the form of a compulsory licence. Such compulsory licensing is essential not only to remedy the failure of the patent owner to work the patent in the host country to a sufficient extent and on reasonable terms, but also to meet the public interest needs of the host country.

The grounds for grant of a compulsory licence may be any one or more of the following:

(i) Public Interest needs.
(ii) The patented invention is not being worked in the host country on a commercial scale or is not being so worked to the fullest extent that is reasonably practicable.
(iii) The demand for the patented product is not being met on reasonable terms or it is being met to a substantial extent by importation from abroad.

(iv) By default of the patent owner or by reason of his refusal to grant a licence or licences on reasonable terms–

(a) a market for the export of any patented product manufactured in the host country is not being supplied or developed;

(b) the establishment or development of industrial or commercial activities in the host country is prejudiced.

(c) The working or efficient working in the host country of any other patented invention is prevented or hindered.

(v) By reason of the conditions imposed by the owner of the patent for the grant of licence under the patent, the manufacture, use or disposal of material not protected by the patent or the establishment or development industrial or commercial activities in the host country is prejudiced.

Compulsory licensing should be clearly recognised as the mechanism for preventing the abuse or misuse of his monopoly rights by a patent owner. It would be wrong to restrict the grounds for grant of compulsory licences to any specific or narrow circumstances. Taking into account its own needs and conditions, each country must be free to specify the grounds on which compulsory licences can be granted under its law and the conditions for such grant. The grant of compulsory licences may, however, be subject to judicial review in accordance with the host country's legal system.

Licence of right

Experience of developing countries shows that the grant of compulsory licences is often mired in extensive and protracted litigation. Therefore, even though the law may provide for compulsory licence to prevent the abuse of patent rights, the remedial effect is not actually felt by the society. In certain critical sectors such as food, pharmaceuticals and chemicals, the implementation of public policy objectives is thereby nullified.

Therefore, apart from compulsory licences, developing countries should be free to provide for the automatic grant of non-voluntary licences in sectors of critical importance to them, such as food,

pharmaceuticals and chemicals. The grant of such "licences of right" will not be subject to any administrative scrutiny or judicial review as the patents themselves will be deemed to be endorsed with the words "licence of right". The patent owner will be entitled to compensation in accordance with the host country's law.

Exclusions from patentability

An examination of the patent laws of the world show that they almost invariably specify the inventions that are not patentable under their laws. Such exclusion from patentability applies both to general categories as well as to specific sectors or products.

By and large, the following types of inventions are excluded from patentability in the laws of most countries:

GENERAL CATEGORY

(i) Discoveries, scientific theories and mathematical methods.
(ii) Inventions whose use would be contrary to law or morality or injurious to public health.
(iii) Methods for treatment of the human or animal body by surgey or therapy or diagnostic methods practised on the human or animal body.
(iv) Schemes, rules or methods for doing business, performing purely mental acts or playing games.
(v) Plant or animal varieties or essentially biological processes for the production of plants or animals.

SPECIFIC SECTORS/PRODUCTS

(i) Atomic energy and nuclear inventions
(ii) Computer programmes.
(iii) Pharmaceutical products.
(iv) Food products (including beverages and flavourings).
(v) Chemical products.
(vi) Micro-organisms.
(vii) Substances obtained by micro-biological processes.

(viii) Agricultural machinery.
(ix) Methods of agriculture or horticulture.

It is relevant to note that the food, pharmaceutical and chemical sectors have been accorded a differential treatment in the patent laws of developing countries (and some developed countries) because of the critical nature of these sectors to their socio-economic and public interest needs. The experience of developing countries is that the unmitigated operation of the patent system in these sectors will have serious repurcussions on their efforts to raise the standard of living of their people, especially the vulnerable sections of their society, in areas such as agricultural production, nutrition and health care. There is ample evidence to show that the prices of essential drugs have ruled at abnormally high levels in industrialised as well as developing countries, and the public health care system has had to pay excessively high cost, when those drugs were under the patent monopoly of a few transnational corporations. There is also enough documentary evidence to show that transfer pricing has been particularly rampant in the pharmaceutical sector leading to excessive prices being paid for bulk drugs and intermediates. A similar situation has also prevailed in the case of patent monopoly in agro-chemicals that are crucial to enhancing the agricultural production of developing countries. Having regard to the impact of the patent system on these crucial sectors of their economy, most developing countries have either excluded food, pharmaceutical and chemical products from patentability or have limited the patent protection to process patents only or have shortened the duration of the patents in these sectors. The Negotiating Group should recognize the special needs and concerns of the developing countries in these sector, which make it imperative for them to follow a special regime for patent protection in these vital sectors.

There are also a whole range of moral, ethical, environmental and other issues involved in the patenting of living things and genetically engineered micro-organisms. The full dimensions of scientific and technological development in these areas are yet to be comprehended. Even in industrialised countries, the legal and other implications involved in the granting of patents in areas such as bio-technology and genetic engineering are in a

flux, and the wisdom of granting product patents in bio-technology and for higher forms of life is being subject to serious securiny.

Every country should therefore be free to determine both the general categories as well as the specific products or sectors that it wishes to exclude from patentability under its national law taking into consideration its own soico-economic, developmental, technological and public interest needs. It would not be rational to stipulate any uniform criteria for non-patentable inventions applicable alike both to industrialised and developing countries or to restrict the freedom of developing countries to exclude any specific sector or product from patentability.

Product versus Process patents

The question of product versus process patents has been the subject of much debate. Till the mid 1960s, and 1970s, the patent laws of a number of industrialised countries allowed only process patents in the food, pharmaceutical and chemical sectors. The present technological strength of some of those countries in these sectors is attributed at least in part to their following only the process patent system for several decades. The development of the pharmaceutical and chemical industries in some of the highly industrialised countries of today owes its origin to their deliberately adopting a legal framework that excluded or limited patent protection for drugs and chemicals.

The basic rationale behind process patents is that the same product can be manufactured by totally new and different processes. The grant of product patents will inhibit the discovery of more efficient and economical processes for the manufacture of the same product. The fruits of their inventive activity will not be available to these new inventors if their efforts are nullified by product patents given to the inventor of the first process. Such blocking of new research and development will be particularly harmful to developing counties striving to build their own technological capabilities.

Apart from this technological reason, the grant of product patents in food, pharmaceutical and chemical sectors has other adverse implications for their socio-economic development. Given the size of the population of several developing countries and

their extremely low level of per capita income, it is imperative that essential articles such as medicine or food are available to them at reasonable prices, and that the monopoly rights granted through the patent system do not either lead to artificial prices being maintained in these sectors or competition being prevented from coming into the market. The policy options available to the developing countries are either to exclude these critical sectors from patentability or to provide for only process patents in these sectors.

Developing countries should be free to follow either of the two options. Should they choose to follow the latter option, they should be free to provide for process patents only in sectors of critical importance to them such as food, pharmaceutical and chemical sectors. There should not be any rigid and inflexible standard that product patent must be granted in each and every sector.

Where a patent is granted only for a process of manufacturing a product, the owner of the process patent will have exclusive right to only the use of that process, and he will not have any exclusive right to make, use, sell or import that product. In other words, the exclusive right will be confined only to the use of the process and it will not extend to the product covered by that process. Unless this distinction is clearly recognised, the rationale behind the grant of process patents will be lost and there will be serious adverse consequences for the developing countries.

Duration of patents

With regard to the duration of patent protection, given the enormous economic and technological gap between the industrialised and developing countries, there should be no uniform standard for patent duration. In fact, the optimum duration of a patent applicable alike to all countries and all sector is a highly debatable issue.

The developing countries should be free to set the duration at a level significantly lower than that of the industrialised countries in accordance with their own developmental, technological and public interest needs. Secondly, developing countries should also be free to set a shorter duration of patents in sectors of critical

importance to them, such as the food, pharmaceutical and chemical sectors, or to even exclude such sectors from patentability. Thirdly, considering the fact that the working of the patent and not market reservation or importation by the patent owner—must be a fundamental objective of the patent system of developing countries, they should be free to link duration of a patent to its actual working in the host country, failing which the patent should be subject to revocation.

Government Use of patents in public interest

As explained earlier, the patent system of developing countries should strike a rational and reasonable balance between the private monopoly interests of the patent owner and the larger public interest of the society. Therefore, where the public interest, and in particular, national security, food production, poverty alleviation, nutrition, health care or the development of other vital sectors of the national economy so requires it, the host country government or any third person designated by it should be free to work and use the patented invention in the country, including the importation of the patented product if necessary, without the consent of the patent owner on such terms and conditions as the host country government may decide.

Revocation of patents

In order to mitigate the possible abuse of the patent system, the patent law should contain provisions for revocation of the patents in public interest. Specifically, where the host country Government finds that a patent has not been worked on a commercial scale or has been only inadequately worked in the country without any valid reason or that the patent is being used in a manner prejudicial to the public interest, the patent should be liable to revocation. Such revocation will, however, be one after giving an opportunity of hearing to the patent owner and will also be subject to judicial review.

Restrictive and anticompetitive business practices

It is a well-know fact that intellectual property owners and

teachnology suppliers impose a variety of restrictive and anti-competitive conditions in agreements involving the licensing or supply of patents. trademarks know-how and patented products. Such conditions are particularly rampant in the case of developing countries because of the unequal bargaining power between the transnational corporations and recipients in the developing power countries and the imperfect nature of the international technology market. These inhibit the efforts of developing countries in building up their industrial, technological and export capabilities. At the same time, these conditions distort and impede international trade. The restrictive and anti-competitive conditions being imposed by the patent owners and technology suppliers cover a wide range, but typical among them are the followings:

(i) Tied purchases of inputs from the licencor or sources designated by him and prevention of purchases from any other source.

(ii) Prohibition or restriction of exports from the host country.

(iii) Prohibition of the licencee or the receipient from using articles, processes or technology which do not belong to the licensor or the supplier or his nominee.

(iv) Restrictions on the use of the patents, trademark and know-how, especially in matters such as the volume of production, marketing, distribution and pricing of the products.

(v) Restriction on the use of the technology after the expiry of the agreement.

(vi) Restriction on competition as between various licencees as well as between the licencees and third parties.

(vii) Abusive/transfer pricing practices in the supply of raw materials, intermediates and components.

(viii) Grant back provisions, obliging the licencee or the recipient to assign improvements and innovations free of charge.

(ix) Package licensing obliging the licencee or the recipient to make unwanted purchases.

(x) Use of patent licences as a device for carving up markets among patent owners.

The Negotiating Group should work out a comprehensive list of these restrictive and anti-competitive conditions imposed by

licencors. It is essential that the laws pertaining to intellectual property rights prohibit them and declare all licences, contracts and agreement containing such conditions to be null and void.

Part II

TRADE MARKS

The use of foreign trade marks in the domestic market of developing countries has several adverse implications for their social and economic development. These have been well documented in many UN studies and academic publications. It is well recognised that foreign trademarks tend to encourage the production. and consumption of non-essential and luxury goods in poorer societies, thereby distorting their socio-cultural objectives and values. Perspective commentators have drawn attention to the typical and strong tendency in developing countries to imitate the consumption patterns and life styles of affluent countries, although they may be ill-suited to their own conditions and circumstances, and this tendency being a major reason for foreign trade marked goods commanding a premium in most developing countries. There is ample evidence to show that this tendency has lead to misallocation of resources towards the production and consumption of goods that are irrelevant to the basic minimum needs of the society in poor developing countries.

The use of foreign trademarks also entails heavy outflow of foreign exchange not only by way of royalties and profits to the foreign trademark owner, but also by way of import of raw materials, intermediates, capital equipment and components for the production of non-essential goods. Foreign exchange being a scarce economic resource, such outflow places a onerous burden on the developing countries.

Furthermore, there is hardly any worthwhile transfer of technology in the production of such luxury goods. Typically, the marketing and market dominance are based on the power of the brandnames.

The use of foreign trademarks, backed by the enormous advertising and marketing power of transnational corporations, has also an adverse effect on the growth and development of domestic industry in developing countries. An important element of the industrial development strategy of developing countries is to encourage and promote the development of their small and medium enterprises, which is essential not only for building up their entrepreneurial base, but also for mitigating their problem of unemployment. It is particularly the growth of these enterprises that is inhibited by the market dominance of the well-know trademarks of the transnational corporations arising predominantly from their trademarks.

Thus, there are compelling socio-economic reasons behind the public policy objective of developing countries to regulate the use of foreign trademarks in their domestic markets. The freedom of developing countries to regulate the use of foreign trademarks in their domestic markets, in accordance with their national development objectives, should not therefore be curtailed.

Quality assurance function OF trademarks

Quality assurance is an important function of trademarks and it should receive as much attention as protection in any trademark regime. Very recently, in a "parallel imports" case, the import of a product bearing a well-known trademark from the subsidiary of a transnational corporation located in a developing country was prevented by another subsidiary of that transnational corporation manufacturing the same product with the same trademark in a developed country on two grounds, namely (a) the product manufactured by the subsidiary in the developing country was of an "inferior" quality (although it carried the same trademark), and (b) the export of the product from that developing country had been prohibited by the transnational corporation. This shows that even where a product is manu-factured in a developing country with the well-known trademark of a transnational corporation, there is no guarantee that its quality is the same as that of the product manufactured by the parent company or its subsidiary in an industrialised country, and on that ground alone, the export of the product from the developing country can be questioned in a

litigation. Therefore, the trademark law should have a clear stipulation that the foreign trademark owner should give a categorical assurance that the quality of the product bearing his trademark is identical to the product manufactured by the licencor himself in his own country and that in any litigation or proceeding concerning the quality of the product, he will give an assurance to that effect. In particular, developing countries should have the freedom to regulate the quality assurance aspect of the use of trademarks which may extend not only to the quality control responsibilities of the trademark licensor but also to quality certification vis-a-vis products bearing the same trademarks in other countries.

Exhaustion of rights

The doctrine of "Exhaustion of Rights" is linked to "parallel imports the exhaustion of the exclusive rights of the trademark owner should not be limited to the same country or the same free trade area, but should extend globally. In other words, the principle of international exhaustion of rights should apply to trademarks.

Protection of well-know trademarks

There is no internationally accepted standard or criterion for defining a "well-know trademark". The concept of well-known trademarks can apply only to a given country and it cannot be applied internationally. Experience shows that a trademark may be considered to be well-known in one country, but it may not be known at all or it may not have the same value in another country. Whether a trademark must be regarded as a well-known mark in a given country should be left to be determined by that country in each case on the basis of the facts. There can be no universal application of the concept of well-known trademarks.

As regards the question of protection of such trademarks, it is the responsibility of the owner of a well-known trademark to apply for defensive registration of his trademark in accordance with the trademark law of the host country. It is not possible for the host country government either to cancel the registration of trademark already given (except where there is a contravention of the law) or to prohibit the use of a trademark that has not

been registered. Usually, both statutory and common law protection is available for trademarks. It is for the owner of a trademark to take appropriate legal action against any infringement of the trademark by taking recourse to such statutory or common law rights as may be available to him under the national legal system.

Service Marks

The need for protecting service makes is recognised. Whether Service Marks should be protected under the trade mark law by extending the definition of trademark to cover both goods and services or whether there should be a separate legislation for service marks or whether service marks should be protected in any other manner under the legal system of the country should be left to the free choice of the country concerned. It is not appropriate to lay down a uniform standard that the term "trademark" should include service marks also.

Term and maintenance of protection of trademarks

As regards the term and maintenance of protection of trademarks, it is important to recognise the following:

(i) There should be no uniform standard for the initial period of registration of trademark and its subsequent renewal. Each country should be free to decide the appropriate period.

(ii) The exclusive rights under the trademark law can be derived only from registration of the trademark in accordance with the provisions of the law. It cannot be derived merely on the basis of the use of the trademark. An unregistered trademark may at best be entitled to such right as may be available under the common law system of the country.

(iii) The use of a trademark by a third party shall be considered as use by the trademark owner only if the third party is registered as a "Registered User" by the competent authority in accordance with the provisions of the trademark law of the country. The mere authorisation of the use of the trademark by a third party through a private sanction, without the third party being registered as a "Registered User" shall not constitute use by the trademark owner for the purpose of "use" requirements.

(iv) Each country should be free to stipulate any special requirements for the use of a trademark such as the size (as for example, in connection with the display of the generic name on a drug in conjunction with a brand name) or use in combination with another trademark (as for example, the use of a foreign trademark in conjunction with a domestic trademark).

(v) Assignment of a trademark shall be subject to such terms and conditions as the national law may lay down to ensure that the assignment does not circumvent the basic Provisions of the law.

(vi) Each country should be free to cancel the registration of a trademark for non-use after a reasonable period, unless valid reasons are shown for such non-use. A trademark should also be liable for cancellation if it has been registered by the owner without any bonafide intention to use it in the host country.

Experience of developing countries shows that as in the case of patents, trademark licensing agreement also contain numerous restrictive and anti-competitive conditions imposed on the licencee by the licencor of the trademark. Many of the examples given in para 30 above, such as export restrictions, tied purchases, restrictions on volume of production, marketing and distribution and the like apply equally to trademark licensing agreements also. As in the case of patents, trademark licensing agreements containing such restrictive and anti-competitive conditions should be declared by law to be null and void.

Part-III

COPYRIGHT

The Berne Convention for the Protection of Literary and Artistic Work is more that adequate to deal with copyright protection.

Part-IV

INTEGRATED CIRCUITS

A Treaty on intellectual property in respect of integrated circuits has been concluded in the Diplomatic Conference held for conclusion of such a Treaty in Washington, D.C. from May 8-26, 1989. The Treaty has been adopted with 49 States voting in favour, 2 against and 5 abstentions. It is expected that WIPO will organise a special meeting on the subject for the developing countries to frame a Model Law which would provide a useful reference for national legislation on the subject. Now that this Treaty has been concluded, the intellectual property protection in respect of lay-out designs (topographies) would be dealt with by each country accordingly.

Part -V

TRADE SECRETS

Trade secrets cannot be considered to be intellectual property rights. The fundamental basis of an intellectual property right is its disclosure, publication and registration, while the fundamental basis of a trade secrecy it its secrecy and confidentiality. The laws of many developing countries clearly stipulate that the term "Licencor" and "licencee" should not be applied to a transaction involving the supply of confidential know—how, and only expression such as "supplier" and the "recipient" should be used because such know-how cannot be regarded as a licensable right. The observance and enforcement of secrecy and confidentiallty should be governed by contractual obligations and the provision of appropriate Civil Law and not by intellectual property law.

Since trade secret cannot be regarded as an intellectual. property, it is beyond the mandate of the Netotiating Group to consider this matter.

Part-VI

STANDARDS AND PRINCIPLES AND GATT FRAMEWORK

Since its inception, the patent system has always been regarded as an instrument for the promotion of inventive activity and its commercialisation in the patent granting country. The underlying philosophy of the whole system is that if exclusive monopoly rights are conferred by the States on inventors, it will give a fillip to new inventions and the inventions will be followed by innovations and investments for the commercial working of the inventions, thereby leading to the industrial progress of the country. The typical definition of a patent itself makes it clear that the invention should not only be novel, but it should also be capable of industrial application. The patent system has not been conceived as an instrument for the promotion of international trade. The basic elements of a patent law, such as the definition of an invention, patentable and non-patentable inventions, product versus process patents, duration of a patent, exclusive rights of a patent owner, commercial working, compulsory licensing, restrictive business practices, revocation of patents and the like, have always been viewed in the context of giving protection and exclusive rights for the purposes of encouraging inventive activity and the balancing of such protection or misuse of the monopoly rights with public interest needs. Barring the restrictive and anti-competitive practices of the patent owners that definitely have the effect of impeding or distorting international trade, the other afore discussed features of the patent system are not related to international trade. Such effects as they may have on trade are merely incidental because the basic purpose of the patent system is not promotion of trade, but of inventive activity. Likewise, the basic purpose of a trademark system is to distinguish the goods of one manufacturer from those of another in the market place and to protect public against confusion and deception. The basic purpose of a copyright system is to give protection to copyright in literary, dramatic, musical or artistic work, cinematographic

films and the like. The protection of intellectual property rights has no direct or significant relationship to international trade. It is because substantive issues of intellectual property rights are not germane to international trade that GATT itself has played only a peripheral role in this area and the international community has established other specialised agencies to deal with them. It would therefore not be appropriate to establish within the framework of the General Agreement on Tariffs and Trade and new rules and disciplines pertaining to standards and principles concerning the availability, scope and use of intellectual property rights.

N.B.: This is reproduction of the text of the paper presented by Shri A.V. Ganesan, Special Secretary, Ministry of Commerce, at a meeting of a negotiating Committee under the Uruguay Round.

New Delhi, dated July 28, 1989.
416/23 27.7.89 16.45 Hrs.

Annex 4

Bill No. 10-C of 1995

The Patents (Amendment) Bill, 1995

A BILL

further to amend the Patents Act, 1970

Whereas India is a signatory to the agreement for the establishment of the World Trade Organisation including the Agreement on Trade Related Aspects of Intellectual Property Rights for the purpose of reduction of distortions and impediments to international trade and promotion of effective and adequate protection of intellectual property rights;

And Whereas with a view to meeting India's obligations under the said Agreement while safeguarding its interests, it has become necessary to amend the Patents Act, 1970 in conformity with the obligations under the Agreement that signatory countries, in formulating or amending their laws and regulations, may adopt measures consistent with the said Agreement, necessary to protect public health and nutrition and to promote public interest in sectors of vital importance to their socio-economic and technological development;

Be it enacted by Parliament in the Forty-sixth Year of the Republic of India as follows:

Short title and commencement.

1. (1) This Act may be called the Patents (Amendment) Act, 1995.

(2) It shall be deemed to have come into force on the 1st day of January, 1995.

2. Section 5 of the Patents Act, 1970 (hereinafter referred to as the Principal Act) shall be re-numbered as sub-section (1) thereof and after sub-section (1) as so re-numbered, the following sub-section shall be inserted, namely:—

"(2) Notwithstanding anything contained in sub-section (1), a claim for patent of an invention for a substance itself intended for use, or capable of being used, as medicine or drug may be made and shall be dealt, without prejudice to the other provisions of this Act, in the manner provided in Chapter IVA".

3. After Chapter IV of the principal Act, the following Chapter shall be inserted namely:—

"CHAPTER IVA

Exclusive Marketing Rights

24A. (1) Notwithstanding anything contained in Sub-section (1) of section 12, the Controller shall not, under that sub-section, refer an application in respect of a claim for a patent covered under sub-section (2) of section 5 to an examiner for making a report till the 31st day of December , 2004 and shall, where an application for grant of exclusive right to sell or distribute the article or substance in India has been made in the prescribed form and manner and on payment of prescribed fee, refer the application for patent, to an examiner for making a report to him as to whether the invention is not an invention within the meaning of this Act in terms of section 3 or the invention is an invention for which no patent can be granted in terms of section 4.

(2) Where the Controller, on receipt of a report under sub-section (1) and after such other investigation as he may deem necessary, is satisfied that the invention is not an invention within the meaning of this Act in terms of section 3 or the invention is an invention for which no patent can be granted in terms of section 4, he shall reject the application for exclusive right to sell or distribute the article or substance. 20

(3) In a case where an application for exclusive right to sell or distribute an article or a substance is not rejected by the Controller on receipt of a report under sub-section (1) and after such other investigation, if any, made by him, he may proceed to grant exclusive right to sell or distribute the article or substance in the manner provided in section 24B.

24B. (1) Where a claim for patent covered under sub-section (2) of section 5 has been made and the applicant has,—

(a) where an invention has been made whether in India or in a country other than India and before filing such a claim, filed an application for the same invention claiming identical article or substance in a convention country on or after the 1st day of January, 1995 and the patent and the approval to sell or distribute the article or substance on the basis of appropriate tests conducted on or after the 1st day of January, 1995, in that country has been granted on or after the date of making a claim for patent covered under sub-section (2) of section 5; or

(b) Where an invention has been made in India and before filing such a claim, made a claim for patent on or after the 1st day of January, 1995 for method or process of manufacture for that invention relating to identical article or substance and has been granted in India the patent therefor on or after the date of making a claim for patent covered under sub-section (2) of section 5,

and has received the approval to sell or distribute the article or substance from the authority specified in this behalf by the Central Government, then, he shall have the exclusive right by himself, his agents or a licencees to sell or distribute in India the article or the substance on and from the date of approval granted by the Controller in this behalf till a period of five years or till the date of grant of patent or the date of rejection of application for the grant of patent, whichever is earlier.

(2) Where, the specifications of an invention relatable to an article or substance covered under sub-section (2) of section 5 have been recorded in a document or the invention has been tried or used, or, the article or the substance has been sold, by

a person, before a claim for a patent of that invention is made in India or in a convention country, then, the sale or distribution of the article or substance by such person, after the claim referred to above is made, shall not be deemed to be an infringement of exclusive right to sell or distribute under sub-section (1):

Provided that nothing in this sub-section shall apply in a case where a person makes or uses an article or a substance with a view to selling or distributing the same, the details of invention relatable thereto were given by a person who was holding an exclusive right to sell or distribute the article or substance.

24C. The provisions in relation to compulsory licences in Chapter XVI shall, subject to the necessary modifications, apply in relation to an exclusive right to sell or distribute under section 24B as they apply to, and in relation to, a right under a patent to sell or distribute and for that purpose the following modifications shall be deemed to have been made to the provisions of that Chapter and all their grammatical variations and cognate expressions shall be construed accordingly, namely:—

(a) throughout Chapter XVI,—

(i) working of the invention shall be deemed to be selling or distributing of the article or substance;

(ii) references to "patents" shall be deemed to be references to "right to sell or distribute";

(iii) references to "patented article" shall be deemed to be references to "an article for which exclusive right to sell or distribute has been granted";

(b) three years from the date of sealing of a patent in section 84 shall be deemed to be two years from the date of approval by the Controller for exclusive right to sell or distribute under section 24B;

(c) the time which has elapsed since the sealing of a patent under section 85 shall be deemed to be the time which has elapsed since the approval by the Controller for exclusive right to sell or distribute under section 24B;

(d) clauses (d) and (e) of section 90 shall be omitted.

24D. (1) Without prejudice to the provisions of any other law for the time being in force, where, at any time after an exclusive right to sell or distribute any article or substance has been granted under

sub-section (1) of section 24B, the Central Government is satisfied that it is necessary or expedient in public interest to sell or distribute the article or substance by a person other than a person to whom exclusive right has been granted under sub-section (1) of section 24B, it may, by itself or through any person authorised in writing by it in this behalf, sell or distribute the article or substance.

(2) The Central Government may, by notification in the Official Gazette and at any time after an exclusive right to sell or distribute an article or a substance has been granted, direct, in the public interest and for reasons to be stated, that the said article or substance shall be sold at a price determined by an authority specified by it in this behalf.

24E. All suits relating to infringement of a right under section 24B shall be dealt with in the same manner as if they are suits concerning infringement of patents under Chapter XVIII.

24F. The examination and investigations required under this Chapter shall not be deemed in any way to warrant the validity of any grant of exclusive right to sell or distribute, and no liability shall be incurred by the Central Government or any officer thereof by reason of, or in connection with, any such examination or investigation or any report or other proceedings consequent thereon"

4. Section 39 of the principal Act shall be omitted.

5. In section 40 of the principal Act, the words and figures "or makes or causes to be made an application for the grant of a patent outside India in contravention of section 39" shall be omitted.

6. In section 64 of the principal Act, in sub-section (1), in clause (n), the words and figures "or made or caused to be made an application for the grant of a patent outside India in contravention of section 39" shall be omitted.

7. In section 118 of the principal Act, the words and figures "or makes or causes to be made an application for the grant of a patent in contravention of section 39" shall be omitted.

8. (1) The Patents (Amendment) Ordinance, 1994 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the principal Act, as amended by this Act.

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